IN-DEPTH

# Professional Negligence

## EDITION 6

Contributing editor
**Nicholas Bird**
RPC

LEXOLOGY

# Professional Negligence

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In-Depth: Professional Negligence (formerly The Professional Negligence Law Review) provides an indispensable global overview of the law and practice of professional liability and regulation. It covers the fundamental principles of professional negligence law in each jurisdiction, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The authors then review factors specific to the main professions and conclude with an outline of recent developments and issues to look out for in the year ahead.

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# Editor's Preface

**Nicholas Bird**

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This sixth edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in nine jurisdictions. The *Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders concerned with the liability and regulatory issues of professionals across the globe. The variation in law and practice across the different jurisdictions is very noticeable and underlines the usefulness of a guide such as this.

In most jurisdictions, we now face a period of claims and regulatory issues arising out of the current economic and social turbulence. Environmental, social and governance (commonly known as ESG) issues are also a dominant theme across many jurisdictions, and these are bringing about significant changes – and challenges – in both the public and the private sectors. Jurisdictions and professions will be affected in different ways, although all will be alive to the fact that rapidly changing regulatory and legal landscapes, coupled with economic downturns, are the dry tinder for professional mistakes and wrongdoing.

This sixth edition is the product of the skill and knowledge of leading practitioners in nine jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all those who have contributed to this edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found in Appendix 1. I would particularly like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and especially to Bryony Howe, who has assisted in its production with great knowledge and skill. Finally, the team at Law Business Research has managed the production of this edition with passion and great care. I am very grateful to all of them.

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# Argentina

**Martín Torres Girotti**, **Melisa Romero** and **María Victoria Casale**
Bomchil

## Summary

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# Introduction

## i Legal framework

Professional liability in Argentina is governed by the Argentine Civil and Commercial Code (CCC). Specific acts of professional misconduct might also be governed by criminal and administrative law, such as regulations applicable to, among others, lawyers, medical practitioners and certified public accountants (CPAs), in which case criminal or administrative sanctions might be applicable, but these sanctions are independent from the civil liability regime set out in the CCC.

As a general rule, to impose liability on a subject for an act, Argentine law requires the existence of an unlawful behaviour, damage, an adequate causal relationship between the unlawful behaviour and the damage, and wilful misconduct or negligence.[2]

Article 1768 of the CCC sets out a rule of negligence for regulated professions such as lawyers and CPAs, unless a specific result has been compromised.[3]

In cases of professional liability, the following requirements must be proven: the professional did in fact owe a duty of care; and the professional breached that duty and the breach caused damage to the client (either actual damage or lost profit).

Professional duties of care are set out in specific codes of conduct or professional protocols (such as the provisions of Law No. 23,187, applicable to lawyers, or medical protocols, as noted below) or in case law. Therefore, the aggrieved party shall establish that there has been a breach of that duty (i.e., the professional did not comply with the standard of care owed).[4]

Professionals may owe a duty either in contract or in tort law. From the perspective of contract law, the standard of care may be expressed in the contract or implied by statute. The standard of care required in a claim in tort is the standard that would be expected by a reasonable person.[5] Negligence will be established only if the professional has not complied with the standard of care.[6]

However, since the enactment of the CCC in 2015, a uniform methodology for the civil liability regime has been established, so there is a single regime for the imposition of liability, whether it stems from a breach of contract or from tort law. Consequently, the four legal requisites referred to above shall be met: unlawful behaviour, damage, an adequate causal relationship between the unlawful behaviour and the damage, and wilful misconduct or negligence.

Even where a duty, and its breach, have been established, professional negligence claims are required to prove causation. A fundamental doctrine of Argentine law is that of adequate causality, which is codified in Article 1726 of the CCC. According to the adequate causality doctrine, not all conditions that coincide for something to happen are equivalent. A distinction is to be made between cause and a mere condition.[7] It is not sufficient that a fact or an action is a *sine qua non* condition for the damage to happen; after judging its reasonable probability, it must also be deemed to be adequate cause of the damage. Thus, causality is only the specific condition that may have been the key factor for the events at issue to happen, according to a qualified probability. Or, in other words, in the normal

course of events it is plausibly a condition that produces a particular result, and it must regularly produce that result.[8]

Therefore, to establish the cause of damage, it is necessary to make an abstract *ex post facto* adequacy analysis or a calculation of the probability and determine whether, given the facts, the action (or omission) of the presumptive damaging agent was in itself likely to cause the damage in the ordinary course of events. While establishing the existence of the causal link does not require absolute certainty (because a reasonable probability will be sufficient), its existence cannot be founded on conjectures or uncertain possibilities.[9]

Finally, although not widely adopted, professional liability insurance is generally taken out by some professionals, such as medical practitioners.

### ii Limitation and prescription

Although Article 2560 of the CCC provides a five-year term as a general term for the statute of limitations, the common term of three years has been set out in Article 2561 for any duty related to actions for damages arising from civil liability.

This three-year term does not vary according to the cause of the damage and, therefore, it is considered the generic term covering every claim for compensation of damage, whether derived from a breach of contract or from tort law.[10]

The limitation period may be interrupted by any petition to a judicial authority by the right holder that reflects the intention not to abandon the right, even where the petition is defective or made before an incompetent court.

### iii Dispute fora and resolution

The judicial procedure for the purpose of determining a professional's liability corresponds to civil court proceedings, through what are known in the Argentine judicial system as ordinary proceedings. The process is conducted by a judge, in written form. The typical time frame for a first instance judgment is three to five years.

Pursuant to the ordinary procedural rules of the National Civil and Commercial Procedural Code (NCCPC), once the claimant has filed a claim before the court of first instance (and the claim has been served to the other party), the defendant has 15 business days to submit a response to the complaint, including – ultimately – any counterclaim. If a counterclaim is filed, the claimant must provide his or her response, if any, within 15 business days of receipt of the formal notification. Subsequently, the court calls the parties to a preliminary hearing at which, inter alia, it invites the parties to settle the dispute amicably and then, if no agreement is reached on the matter, it decides on the evidence produced by the parties and declares the evidence stage open for a term not exceeding 40 days.

Documentary evidence shall be attached to the claim or statement of defence, while any other evidence the parties intend to produce shall be offered in those main pleadings. In Argentina, there are no discovery proceedings as they are known in the common law.

The NCCPC provides specifically for the following types of evidence: documentary, factual witness, expert evidence, judicial requests for information from private and public entities, judicial confession, and judicial examination of sites or assets.

Experts are considered auxiliaries to the court and, therefore, provide independent advice to the court. Each party can appoint a technical consultant who can file his or her own expert report in writing. The appointment of the consultant is stated at the time that the expert evidence is proposed to the court.

After submission of the expert's written report, the court forwards the report to all parties and they can challenge it or request clarifications during the evidence stage. The court can order the expert to give additional explanations, either verbally or in writing, with the latter being the most frequently chosen option.

In cases of medical malpractice, expert opinions constitute a key element in determining whether professionals have breached the duty of care and, as a general rule, the courts rely on the opinions of medical experts to be able to issue a judgment.

Once the evidence stage is closed, both parties may submit a brief on the evidence within a common term of six days for each party. Judgment should be issued within 40 business days. Any party may file an appeal (without providing grounds) within five business days of receipt of notice of the judgment. A further pleading providing the grounds of the appeal should be filed within 10 business days of receipt of the dossier by the court of appeal.

The Argentine legal system recognises non-judicial dispute resolution procedures, the most common being mediation and arbitration in law or equity.

Within the city of Buenos Aires, the Mediation Law[11] stipulates that mediation proceedings should take place before publicly or privately appointed mediators. These mediators are not empowered to hand down decisions, only to bring the parties together to attempt to reach an amicable settlement. To date, very few provinces have established this mechanism as mandatory. In the event that no agreement is reached, the plaintiff is entitled to bring the case before the courts. If, on the other hand, an agreement is reached, its execution is compulsory for the parties, who may seek judicial enforcement in cases of breach.

Mediation proceedings aside, there are also several permanent arbitration tribunals applying their own procedural rules and with the capacity to issue awards. The main advantages of these permanent arbitration tribunals is their expertise in the resolution of certain disputes, the flexibility of their rules of procedure and the fact that awards are handed down in a shorter time frame than in ordinary judicial courts. Additionally, costs and expenses tend to be lower than those incurred in judicial proceedings. However, these tribunals cannot be used in professional liability cases.

Finally, as regards court costs and legal fees, the general principle under Article 68 of the NCCPC is that the losing party bears all court costs, including those incurred by the opposing party. However, the court may find reasons to exempt the losing party from the obligation to pay the costs of the proceedings, either fully or partially.

### iv Remedies and loss

Article 1740 sets out the principle of full compensation of damage.[12] Although the specific damage to be compensated is examined on a case-by-case basis, the most common items admitted by Argentine courts include compensation of physical damage, loss of earnings or lost wages, and pain and suffering.[13]

Under Argentine law, as a matter of course, an appraisal is required to establish the economic damage caused, comparatively weighing up the situation that the damaged party was in before and after the given event or fact.

In cases of civil liability, compensation of damage resulting in injuries or physical or psychological disability is calculated according to a mathematical formula: the judge must award the damaged party an amount sufficient to cover the diminution of his or her capabilities to perform productive activities, with the awarded amount reaching exhaustion upon conclusion of the term in which the affected party might have reasonably continued to perform such activities.[14]

No punitive damages are applicable to professional negligence, unless the claim falls within the scope of the Consumer Protection Law.[15]

## Specific professions

### i Lawyers

Lawyers in Argentina are subject to the regulations of the CCC and to disciplinary codes of conduct enacted by the legislative branch of the local government.[16] The violation of these local laws or codes may lead to an administrative sanction, but these sanctions are independent from the civil liability regime set out in the CCC.

The CCC regime is applicable to lawyers' professional activities. Therefore, to hold a lawyer professionally liable it is necessary to prove the existence of conduct or omission that infringes a legal duty imposed by law; damage; negligence or wilful misconduct; and an adequate causal relationship between the professional misconduct and the damage suffered by the client or the claimant.[17]

Article 1768 of the CCC sets out a rule of negligence for lawyers. In these cases, lawyers shall be exempted from liability only if they prove that they have acted with proper diligence, according to the circumstances of people, time and place. In general, lawyers are not allowed to guarantee results in legal cases but, instead, should undertake to provide all their technical knowledge and means to perform the activity diligently.

In particular, lawyers are required to have theoretical and practical knowledge of their practice area[18] and are bound by the legal system to act diligently and with necessary caution[19] according to the rules and methods proper to that area (*lex artis*).

However, in certain circumstances a specific result can be guaranteed by lawyers, such as the drafting of a contract. When a duty of this kind is infringed, a liability claim could proceed, regardless of whether the lawyer acted diligently or without wilful misconduct.

The concept of negligence is not different from the one arising from the general liability regime and, therefore, it is not necessary to prove gross negligence for a claim to proceed. Simple negligence and an adequate causal relationship between the negligent conduct and the damage are sufficient to hold a professional liable.[20]

An adequate relationship is required between the professional misconduct and the damage claimed.[21] Consequently, a lawyer will not be held liable for negligently omitting to answer

a claim if, for instance, the amounts claimed were actually owed by the defendant.[22] However, a proper evaluation of the situation should determine whether the diligent behaviour required of the lawyer would have prevented the client from suffering the damage claimed.

Argentine courts have awarded indemnification for damage such as loss of opportunity of success in judicial cases,[23] and for payment of legal costs and other damage directly connected to lawyers' negligent conduct, and even for moral distress.[24] This last type of damage is not always compensated by the courts in lawyer professional negligence cases, which tend to focus on the amounts involved in the dispute, whether the client was prevented from obtaining effective judicial protection, the client's opportunities to have his or her position favourably acknowledged by the court, the specific instructions imparted to the lawyer and legal documents proving the relationship with the client, among other factors. As a result of this analysis, the court would have to arrive internally at the view that the alleged moral distress merited the award of compensation, and it must rely on the evidence produced in the claim.[25]

In Argentina, civil liability insurance is not mandatory for individual lawyers or for law firms, and it is not common practice to take out such insurance.

### ii Medical practitioners

Medical practitioners in Argentina are subject to the civil liability regime set out in the CCC.

As is the case for lawyers, the rule of negligence set out in Article 1768 of the CCC applies to medical practitioners. However, in certain cases, if a result has been promised, the professional should be discharged from liability only if the medical practitioner proves that the patient was negligent (the victim was at fault) or that an event of *force majeure* or another unforeseeable circumstance caused the damage.

Medical practitioners' duty is to provide medical services diligently, in a timely manner[26] and according to the technical knowledge and methods proper to the specific area of expertise (*lex artis*, protocols). However, in cases of medical malpractice by plastic surgeons, courts have stated that the standard of care may be evaluated more stringently.[27]

In medical liability cases, courts rely on expert witness reports to determine whether medical practitioners have been negligent and, consequently, guilty of malpractice,[28] since court-appointed experts are presumed to be impartial.

In most medical malpractice cases, hospitals, clinics and medical services providers are sued as co-defendants, either as employers of the medical practitioners or for a duty of safety towards the patients.[29] This duty arises from the obligation to provide adequate medical services, which is directly related to the existence of malpractice. If medical practitioners' negligence is proven, courts assume that hospitals, clinics and medical services providers were also negligent in their duty to provide adequate medical attention and, therefore, they are held liable for the damage inflicted upon patients.

Although insurance is not mandatory for medical practitioners in every jurisdiction in Argentina, it is widely adopted among professionals. However, most medical practitioners' insurance policies do not fully cover the amounts involved in medical malpractice claims. Since medical malpractice legal actions are normally directed against both healthcare

facilities and the medical practitioner on the basis of their joint liability, healthcare establishments usually have higher levels of insurance coverage.

Argentina has seen an increase in the amounts awarded to plaintiffs as compensation in malpractice cases due to the marked devaluation of the national currency and high inflation rates. This trend has accelerated during 2022.

In addition, the Consumer Protection Law[30] The Consumer Protection Law cannot be applied to practitioners of liberal professions such as doctors,[31] but it can be applied to hospitals, clinics and medical services providers. In a recent medical malpractice case, the National Civil Court of Appeals disallowed punitive damages because the Consumer Protection Law is not applicable to surgeons, and it concluded that the private healthcare company had not intervened directly in the surgeon's actions.[32] Nevertheless, there is currently no uniform criterion regarding the application of consumer law to healthcare services, so case-by-case analysis is necessary. The Consumer Protection Law provides for joint and several liability of all those who participate in the breach of any obligation that results in damage to the consumer.[33] Furthermore, the Law also provides for compensation in the form of punitive damages, the amount of which is determined by the court.[34]

### iii Banking and finance professionals

Banking and finance professionals are not subject to a specific liability regime for professional negligence but, instead, to the general regime of the CCC.

Notwithstanding this, under the general rules of civil liability, they are considered to be subject to an augmented degree of responsibility given their status as professional financial intermediaries; the public interest aspect of their performance in attracting public savings; the fact that their performance is regulated by the Central Bank of Argentina (BCRA); and the extensive amount of information they provide to, and negotiations they undertake with, clients.[35]

This augmented liability means that banking and finance professionals' duties of diligence and care in carrying on their activities are considered to be legally more consequential than those of others and, therefore, a negligent action on the part of a financial entity renders it liable not only to repair the damage caused but also to reduce to the greatest extent possible any consequences of the damage.

On this basis, according to Argentine case law, financial institutions' duty to compensate must be judged by the rules of professional responsibility, given that they are organised as companies, carrying out commercial acts on a regular basis and profiting from these. Therefore, the evidentiary standard required to exempt these institutions from this responsibility is higher than that required for any other natural or legal person.[36]

In line with this augmented liability, prevention of damage and protection of banking consumers, the CCC establishes particular duties of information and transparency regarding financial products and services, which must be observed by financial institutions both when offering the products and services and when arranging and executing operations with clients. These duties are a specific application of the general obligations imposed by the Consumer Defence Law on all providers of goods and services in their relations with consumers,[37] corresponding to rights in favour of users of financial services specifically

regulated by Communication 'A' 7156 of the BCRA. Banks and financial institutions are mandatorily required to meet these obligations in favour of consumers. Therefore, they cannot avoid liability by merely proving compliance with the law but, rather, must demonstrate that a breach is attributable to (1) the fault of the consumer, (2) the fault of third parties that are independent of the financial entity, or (3) *force majeure*.[38]

A particular duty of professional responsibility is established in the case of safe deposit box services, since the financial institution providing such a service must respond to the user as to the suitability of the custody of the premises, the integrity of the boxes and their content, in accordance with not only the agreed terms but also the expectations created in the user. The clauses of limitation of liability of the service provider are considered unwritten, although the limitation can be made up to a maximum amount if it is proven that the user was duly informed and the limit does not denature the obligation of custody that constitutes the essence of the contract. Given the qualified duty of custody that falls to financial entities, they cannot be exempted from liability even through invoking *force majeure*.[39]

### iv Computer and information technology professionals

In Argentina, there is no specific regime regarding the negligence liability of computer and information technology (IT) professionals. Their obligations and liability regime is specified in the CCC, Title IV, Chapter 6, Section1-3, which states rules for the provision of service contracts and contracts assuring the production of a certain work (assurance of a certain result). Their liability could also arise from the general liability regime stated in the CCC when the damage is inflicted upon third parties while performing their services or producing an agreed final project.

Pursuant to Article 1256 of the CCC, service providers must execute their obligations according to both the terms of the contract agreed by the parties and the knowledge reasonably required by the art, science and technology of the area of expertise at the time of the provision of the services. Among other duties, service providers must fulfil the agreed services within the time limits stipulated in the contract or within the reasonably expected time for the type of service. These obligations imply certain results, failure to achieve which entails an obligation to indemnify the contracting party.[40]

Violation of the specific duties makes the service provider liable for damages, unless fulfilment of the services is rendered impossible by an external cause not attributable to the provider. In that case, the agreement may be considered terminated, and the service provider is entitled to charge the costs of the services effectively provided up to the termination date, but no damages will be awarded.

Insurance is not mandatory for these kinds of services, although many IT companies usually have insurance policies covering liability.

### v Real property surveyors

Real property surveyors are subject to national Decree-Law No. 6,070/1958, which regulates the exercise of the profession in the national jurisdiction. Local jurisdictions have specific local laws and surveyors are also subject to complementary ethics codes. Negligence in the practice of the profession may result in the application of administrative

sanctions according to these laws and can sometimes lead to liability claims under the general liability regime provided by the CCC.

An adequate causal relationship between the negligent performance of the surveyor and the damage claimed is required for liability.[41]

Insurance policies are not mandatory in Argentina for this profession.

### vi Construction professionals

The responsibilities of construction professionals are regulated at the federal level by the CCC, and this is complemented by specific regulations in each province and local city regulations.

Consequently, the general liability regime established is complemented by the following standards: the site manager is responsible for third parties (i.e., builders, subcontractors and providers – including those hired by the principal); the construction work shall be performed in accordance with the contractual provisions and with the standards required by the art, science and technique of the activity concerned; and the construction work shall be executed in the agreed time or, failing that, in the time that reasonably corresponds to the nature of the work.

Builders (and construction professionals in general in that role) are responsible for defects that were not apparent at the time of taking receipt of the work and that are reported by the client within 60 calendar days of their appearance (or from their becoming noticeable if they manifest gradually).

If the construction work was carried out in a building and is destined by its nature to have a long duration, the builder responds to the principal and the purchaser for the damage that compromises its solidity and for what makes it unsuitable for its intended purpose. The constructor is only released from this obligation if an external cause is proven. A failure of the soil is not considered to be an external fault even if the land belongs to the principal or a third party; nor is a failure of the materials, even if these are not provided by the contractor. Depending on the cause of the damage, this responsibility may be extended to the subcontractor, the designer, the project manager and any other professional linked to the principal by a construction work contract referring to the damaged work or any of its parts. For this responsibility to be applicable, the damage must occur within 10 years of acceptance of the work by the client.

Contractual clauses limiting or excluding the responsibility of the builder for damage compromising the solidity of a construction work carried out in a long-term property, or that makes it unsuitable for its intended purpose, are considered unwritten.

Finally, the builder, subcontractors and professionals involved in a construction are obliged to observe administrative regulations and are responsible, even in respect of third parties, for any damage caused by non-compliance with these regulations.

### vii Accountants and auditors

The general aspects of the civil professional responsibility of accountants and auditors are regulated by the CCC and more specifically by various complementary regulations

pertaining to different relevant issues, such as the Companies Law, the Financial Entities Law, the Bankruptcy Law, the Capital Markets Law[42] and the applicable technical resolutions issued by the Argentine Federation of Professional Councils of Economic Sciences.

As these are highly qualified professionals, their responsibility is especially augmented under the standard set out in Article 1725 of the CCC, according to which the greater the duty to act with prudence and full knowledge of the circumstances, the greater is the diligence required of the agent and in the assessment of the predictability of the consequences.

Given this qualified duty of diligent action, according to national doctrine and case law, the possibility of exempting auditors from liability is conditional upon the following:

1. limiting or exonerating clauses established in the contracts with the audited firms;
2. the opinions issued contained judgements only of reasonableness and not of certainty;
3. the opinions provided relied on sampling techniques; or
4. the auditors acted according to the minimum performance guidelines established by their own auditing firms or by bodies controlled by them, etc.[43]

In principle, their obligations are considered to be of means, but they may on occasion also be deemed to be obligations of results, especially when they act as trustees of companies, so their responsibility in the event of non-compliance with these specific obligations is objective (i.e., for the duty to compensate to arise, it is sufficient to prove that the promised result was not achieved, without any need to prove the existence of negligence).[44]

This responsibility is established in favour of not only their clients but also third parties harmed by their actions, to the extent that the basic assumptions of responsibility are proved.[45]

### viii Insurance professionals

Professional responsibilities in relation to insurance activity in Argentina are regulated, in substance, by the Insurance Entities Law[46] and by various specific resolutions issued by the supervisory authority, the National Superintendence of Insurance (SSN).

The regime includes both insurance companies and their auxiliaries, namely brokers, agents, intermediaries, experts and liquidators.

The Insurance Entities Law provides for the following responsibilities of insurance entities: the exercise of insurance activity in accordance with the Insurance Entities Law and regulatory resolutions issued by the SSN; the maintenance of economic and financial capacity; and granting access to inspection by the control authorities. Failure to comply with these obligations is sanctioned with various penalties, which, depending on the seriousness of the offence, may consist of a call for attention, warning, fine or suspension of operations in one or more authorised branches for up to three months. Furthermore, insurers cannot be exculpated from their responsibility by alleging the fault or fraud of their officials or employees, and could be even held liable for acts or omissions by their brokers

on the basis of general rules of the NCCC and certain precedents of the National Supreme Court of Justice.[47]

Intermediaries engaged in insurance activity are subject to a general rule requiring them to perform according to the relevant legal provisions and applicable technical principles, and with diligence and good faith. The sanctions applicable in cases of infringement are a call for attention, warning, fines and disqualification of up to five years. The penalty is graduated according to the functions of the offender, the seriousness of the offence and any recidivism. Those responsible are jointly and severally liable to pay the fine imposed. If disqualification is imposed, insurers cannot pay out any insurance compensation while the penalty is in effect.

Sanctions are also established for cases in which brokers, agents or other intermediaries do not deliver the premiums received to the insurer in due time.

This special regime is complemented by the general regime of the CCC, whereby the responsibilities of insurance professionals are judged to be augmented or qualified because of the specialised nature of the activity. The Consumer Protection Law is also applicable, particularly regarding the duty of information to clients and failure to discharge this duty may entail the invalidation or setting aside of the circumstances not duly notified, as well as the imposition of punitive damages.[48]

## Year in review

As regards medical malpractice, following the increase in interest and inflation rates due to the recent economic crisis, there has been an increase in the amounts awarded to compensate damage in cases of injuries or physical or psychological disability. This trend has accelerated in the past year and is having a direct impact on ongoing proceedings, because the current interest rate published by the Bank of the Argentine Nation (BNA) is applied to compensation amounts from the date of the negligent medical event until the date of effective payment, and this rate has increased significantly recently.

Moreover, in some cases, civil courts have applied specific interest rates (e.g., two times the current interest rate published by the BNA) to reflect adequately the increase in costs. However, in a recent case, the National Supreme Court of Justice rejected this mechanism, because it is neither authorised nor provided for by the CCC.

There have also been developments in the use of mathematical formulae to calculate the amounts for compensation of physical damage.[49]

## Outlook and future developments

During the past couple of years, there has been an increase in the use of artificial intelligence and technology in the delivery of services. Therefore, developments are expected in matters in this area, in particular in relation to data protection and data breaches, where the avoidance of an increase in the liability exposure of professionals represents a challenge.

In addition, there has been an increase in medical malpractice litigation because of the pandemic, but the vast majority of cases have yet to be concluded. In the upcoming years,

the focus will be on the standard of care and the quantification of damages derived from case law on this matter. Developments are also expected regarding the applicability of punitive damages to healthcare providers under the current consumer protection regime, because at present there is no uniform criterion being used to address this matter in medical malpractice cases.

## Endnotes

**1** Martín Torres Girotti and Melisa Romero are partners and María Victoria Casale is a senior associate at Bomchil. ^ Back to section

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**3** Article 1768 of the Argentine Civil and Commercial Code (CCC), available (in Spanish) at: https://www.wipo.int/wipolex/en/text/526397. ^ Back to section

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**7** Diez-Picazo, Luis,*Derecho de daños,* Civitas, Madrid, 2000, p. 334; Zavala de Gonzalez, Matilde, *Actualidad en jurisprudencia sobre derecho de daños – Relación de causalidad*, La Ley, 1997-D, p. 1272: Trigo Represas, Félix A – López Mesa, Marcelo J, *Tratado de la responsabilidad civil*, La Ley, Buenos Aires, 2004, Vol. I, p. 609. ^ Back to section

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**9** Trigo Represas, Félix A – López Mesa, Marcelo J,*Tratado de la responsabilidad civil*, La Ley, Buenos Aires, 2004, Vol. I, p. 614. ^ Back to section

**10** Alferillo, Pascual E,*Prescripción de la acción de daños en el Código Civil y Comercial. Estudio comparativo*, SJA 15/4/2015, 15/4/2015, 3, Thomson Reuters La Ley AR/DOC/4781/2015. ^ Back to section

**11** Law No. 26,589 on Mediation and Conciliation. ^ Back to section

**12** Article 1740 CCC. ^ Back to section

**13** Article 1741 CCC. ^ Back to section

**14** Article 1746 CCC. ^ Back to section

**15** Law No. 24,240 of 22 September 1993 on Consumer Protection (Law No. 24,240). ^ Back to section

**16** Argentina is divided into 23 provinces and a federal capital – the Autonomous City of Buenos Aires – and each province has its own governor, legislature and judiciary. ^ Back to section

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# Brazil

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## Summary

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**SPECIFIC PROFESSIONS**
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# Introduction

## i Legal framework

In Brazil, professional civil liability is characterised as contractual, once it arises from the violation of a duty set out in a particular contract that governs the rendering of professional services. In other words, it is the obligation to indemnify the damage caused during the exercise of an independent or subordinate profession as a result of a professional error.

In general, legal regulation is provided by the Civil Code, the Consumer Defence Code and administrative rules governing specific professions, which are subject to special rules in view of their inherent risk, as will be addressed in Section II.

This is because, in some cases, a professional error can cause serious harm and, therefore, certain requirements, such as attainment of a university degree and membership of the competent professional association, must be observed for the exercise of the profession. This is the case, for example, for lawyers, doctors and engineers. However, regardless of the fulfilment of these requirements, the professional who is negligent and causes damage will be required to indemnify the injured party.[2]

In this sense, Article 14, Section 4 of the Consumer Defence Code establishes that the liability of the freelancer[3] will be personal (i.e., subject-based) or fault-based (i.e., the fault must be demonstrated, along with the professional error, the damage and the causal link).

However, not all cases of professional liability will be governed by the traditional regime of subject-based liability, either because not all will be considered consumer relationships or because the nature of the obligation – whether of means or result – will be decisive for the definition of the nature of the civil liability itself.

In general, under an obligation of means the professional is obliged to undertake technique and diligence in his or her practice to obtain the required result but without guaranteeing that this result will ultimately be achieved.

As a rule, the obligations of a doctor and a lawyer are obligations of means, as they do not assure a particular outcome, such as healing a patient or being successful in a lawsuit. Nonetheless, these professionals must act diligently and in compliance with the available and adequate techniques, otherwise they will be responsible for any damage caused by negligent performance.

Consequently, the fault-based regime applies to obligations of means as the professional will be liable when executing professional obligations with negligence, recklessness or malpractice – in other words, fault.

In contrast, under obligations of result the professional is required not only to act diligently but also to obtain the expected result. Therefore, non-achievement of the result will entail liability for any consequential damages.

For example, the work of a contractor is an obligation of result because only the completion of the work according to the agreed terms and conditions will discharge the contractual obligations. Once these differences are understood, a question arises as to defining in practice whether the professional activity is classified as an obligation of means or of result.

According to doctrine, obligations of means occur in cases where the contract involves an inherent risk and, therefore, the professional cannot assure the result in view of factors beyond his or her control. Vanessa Donato de Araujo explains:

> where there is risk, the obligation is of means, because, strictly speaking, the debtor cannot compromise to obtain a result that can only be eventually achieved. In cases where the achievement of a result is not random and only depends on his performance, it can be assumed that the debtor compromised to fulfil that particular outcome.[4]

Once the nature of the obligation is defined, an important distinction must be made: considering that an obligation of result does not require evidence of fault, will the professional liability be strict liability? The answer is negative. Fault is never discussed in strict liability. It is up to the creditor to simply demonstrate the unlawful act, the damage and the causal link. However, the professional will be able to argue the lack of fault as a defence to demonstrate that he or she undertook all the necessary diligence and employed the necessary technique to obtain the result. This means that civil liability with respect to an obligation of result will be subject-based but with a presumption of fault.[5]

Therefore, neither the strict liability nor the traditional fault-based liability applies to obligations of result. It differs from the fault-based liability applicable to obligations of means, where the burden of proof regarding the fault lies with the creditor, who must demonstrate not only the damage and the causal link but also the negligence of the professional.

Aside from the burden of proof, there are other defences, such as acts of God and *force majeure*, exclusive fault of the victim and third-party acts.

In addition, it is also possible to apply contractual clauses limiting or exonerating parties from the obligation to indemnify. However, such clauses, especially clauses fully releasing parties from the obligation to indemnify, are likely to be deemed invalid in cases of liability for gross negligence or wilful acts or, for example, when inserted in adhesion contracts or consumer agreements.

So far, we have addressed the responsibility of the professional who directly causes the damage as a result of his or her own act. However, there are situations where the professional is an employee or representative of a certain company, giving rise to civil liability through the act of a third party. This scenario is covered by Article 932(II), of the Brazilian Civil Code, which establishes that 'the employers or principals are also responsible for civil reparation for their employees, servants and agents in the exercise of their work, or in their name'. This responsibility does not depend on the employer being at fault, and the employer will have the right of recovery against the employee to be reimbursed for payment made on the employee's behalf, as provided by Articles 933 and 934 respectively.

Thus, liability for a third party is strict, once the employer is liable 'for the actions of its employees because it creates the risk of the damage that the employee may cause, by hiring him to develop activity in its benefit'.[6] However, the employer will only respond if the fault of the employee is demonstrated in accordance with the nature of the obligation, whether of means or of result.

Once the responsibility of the employee is established, he or she will be jointly liable with the employer, in accordance with Article 942 of the Civil Code. In this context, the defences available to the employer are limited, such as acts of God or *force majeure*, the exclusive fault of the victim, and execution of the act by the employee outside the exercise of professional duties.[7]

### ii Limitation and prescription

In general, where a consumer contract is operative, the limitation period for the client to file a lawsuit against the professional is five years, starting from the knowledge of the damage and of its agent, in accordance with Article 27 of the Consumer Defence Code.[8]

However, it is important to emphasise that the limitation period may change depending on the type of profession and whether it is defined as a consumer relationship.

For instance, the Superior Court of Justice understands that, in the medical field 'the Consumer Defence Code is applied to medical services, including the five-year limitation period provided in Article 27 of the Consumer Defence Code'.[9]

However, the position is different regarding the civil liability of lawyers. According to the Superior Court of Justice, this professional relationship is not regulated by the Consumer Defence Code and, therefore, the five-year period does not apply. This is in fact deemed to be a contractual civil relationship, to which the general term of 10 years applies, pursuant to Article 205 of the Civil Code.[10]

The 10-year term also applies to the constructor's liability for defects in construction work. According to Article 618 of the Civil Code, the builder will only be held liable if the defect is verified within five years of its delivery and, thereafter, the 10-year limitation period begins to run.[11]

### iii Dispute fora and resolution

The state courts are competent to judge negligence lawsuits, which will follow the procedural rules of the Brazilian Code of Civil Procedure.

As a rule, lawsuits for damages must be filed at the place of the defendant's domicile, as provided in Article 46 of the Code of Civil Procedure. However, special rules may apply, such as in the case of lawsuits against professionals, which can be filed at the place of the domicile of the plaintiff or defendant, according to Article 101(I) of the Consumer Defence Code.[12]

In general, the proceeding is public and based on conciliation as a form of consensual solution. The parties must bear the cost of filing a claim and certain appeals, which vary according to each state. In addition, the losing party will be sentenced to pay the costs incurred by the other party, as well as the legal fees for the lawyer of the winning party, which will be set by the judge and may vary between 10 and 20 per cent of the value of the award or the economic benefit obtained.

An arbitration procedure, regulated by Law No. 9307/1996, is also an option. Despite its advantages, such as confidentiality, arbitrators' specialist experience and speed, there is

no recourse to appeal and the costs are significant; therefore, this option is only commonly adopted in cases strategically.

Finally, there is the possibility of entering the lawsuit before the special civil courts, offices of the judiciary who assess cases of a lesser degree of complexity and of a value up to 40 times the Brazilian minimum wage (currently 52,800 reais). The parties are exempt from the payment of costs and the lawsuit must be filed at the place of the defendant's domicile or, if it is a lawsuit for damages, the author's domicile or the place where the act took place, according to Article 4 of Law No. 9099/95.

### iv Remedies and loss

A professional error can cause three types of damage: property damage, pain and suffering, and disfiguring damage. In Brazil, there is no concept of punitive damages as in US law.

According to the general rule of Article 944 of the Civil Code, 'the indemnity is measured by the extent of the damage'. The principle of full compensation is applicable, therefore, the matter of fault does not bear on the amount of compensation, except in situations where there is 'excessive disparity between the seriousness of the fault and the damage', as provided in Article 944.

Specifically regarding obligations of means, both doctrine and case law have been applying the theory of loss of chance to quantify compensation. This is because it is impossible to guarantee that had the professional acted diligently the result would certainly have been reached.

Thus, the compensation is proportionally reduced in relation to the serious and real probability that the client would have obtained the anticipated result if the professional had acted diligently.[13] According to Sérgio Savi, such a loss of opportunity is only established when its probability is greater than 50 per cent. Nonetheless, 'the indemnification of the lost chance will always be less than the value of the expected useful result'.[14]

In this context, the Superior Court of Justice has ruled that 'in civil liability for the loss of a chance, the amount of the compensation does not correspond to the final loss and must be obtained by valuing the lost chance as an independent interest'.[15] Recently, a new precedent regarding the loss-of-chance theory has been issued by the Superior Court of Justice, which is further commented upon in Section III.ii.

## Specific professions

### i Lawyers

The activity of advocacy is regulated by Law No. 8906/94 and by Resolution No. 02/2015 of the Brazilian Bar Association (OAB), which approved the OAB Code of Ethics and Discipline.

While the Code of Ethics establishes the principles that guide the conduct of lawyers, Law No. 8906/94 provides for the practice of advocacy and the rights of the lawyer, the requirements for registration, disciplinary infractions and sanctions, among other things.

As to liability, Article 32 of Law No. 8906/94 states that 'the lawyer is responsible for actions committed with fraud or negligence in the exercise of the profession' (i.e., the personal liability regime applies).

There is an interesting question regarding liability for advice given by means of legal opinions. Some authors believe that the lawyer would only be liable in cases of fraud, while there is an opposite view that the demonstration of fault is the only requirement.[16] In this regard, Article 32 states that 'the lawyer is responsible for actions committed with fraud or negligence in the exercise of the profession'. On this subject, the OAB sent a proposal for a binding precedent to the Supreme Federal Court (STF), with a view to establishing that an attorneys' liability can only be recognised for issuing a legal opinion in cases where a link between the attorney's malicious conduct and the illicit act has been demonstrated.[17] The proposal is currently being considered by the STF.

In addition, Article 32 (sole paragraph) provides for a singular situation of liability in cases of reckless claims, where 'the lawyer is jointly liable with his client, if they have colluded to harm the opposite party, which will be verified in the specific lawsuit'.[18]

In summary, the doctrine holds that the lawyer is liable for errors of fact and for errors of law,[19] but, in the case of errors of law, only when they are serious.[20]

Therefore, although it would be necessary to ascertain the lawyer's performance in the particular case at hand, the following actions may, in principle, be indicative of the lawyer's liability: filing an unfeasible suit, lacking knowledge of the law or jurisprudence, failing to submit a timely defence or appeal, and failing to pay or making incorrect payment of court fees.[21]

### ii Medical practitioners

The medical profession is governed by Resolution No. 2217/2018 of the Federal Council of Medicine, which approved the Medical Code of Ethics.

Article 1 of the Resolution establishes that the doctor is prohibited from 'causing harm to the patient, by action or omission considered to be malpractice, recklessness or negligence'. Article 1 adds that 'medical liability is always personal and cannot be presumed'. In other words, it confirms the medical professional's personal responsibility derived from the obligation of means.

In addition, Article 22 states that the physician must obtain consent from the patient or the patient's legal representative after explaining and clarifying the procedure to be performed, except in cases of imminent risk of death. Recently, however, the Superior Court of Justice decided that '"blanket consent" is not admissible, that is, the generic consent, in which there is no individualisation of the information provided to the patient, thus hindering the exercise of his fundamental right to self-determination';[22] therefore, the information provided by the doctor to the patient about the risks, benefits and alternatives to the indicated procedure must be clear and precise, and it is not enough for the health professional to inform, in a generic manner or with technical terms, about the possible risks of the treatment.

Even if the consent is obtained, the doctor shall assume responsibility for the professional act, in accordance with Article 4. In this sense, the Superior Court of Justice has ruled that fault liability applies in cases of breach of the duty of information as it compromises the consent of the patient, and that the Consumer Defence Code applies, which means that the judge may decide that the burden of proof lies with the doctor and not the patient.[23] However, doctrine holds that certain activities may constitute an obligation of result, such as 'plastic surgery and technical procedures of laboratory examination and others, such as radiographs, tomographies, magnetic resonances'.[24] The position of the Superior Court of Justice is that cosmetic surgery is subject to an obligation of result, while restorative surgery is subject to an obligation of means.[25]

Regarding the discussion about the liability of hospitals, the Superior Court of Justice has decided that the fault regime applies. Therefore, it will depend on the evidence regarding the physician's fault. The strict regime will only apply if the services provided by the hospital are defective, such as those related to the hospitalisation and feeding of the patient, facilities, equipment and auxiliary services, nursing and medical examinations.[26] The responsibility for anaesthesia has also been discussed. For Sílvio Venosa, it carries an obligation of means.[27] The Superior Court of Justice ruled that it only falls 'to the joint liability of the head of the medical team when the person who caused the damage is part of the team in a subordinate position. Thus, in the case of an anaesthesiologist, who is part of the team but acts as an autonomous professional, following techniques specific to his or her medical speciality, he or she must be individually held responsible for the event.'[28]

The same understanding applies to dentists, whose activity is regulated by Law No. 5081/66. The Superior Court of Justice has also decided that the dental surgeon is subject to an obligation of means.[29] However, in the case of cosmetic treatment or preventive dentistry, the obligation is one of result.[30]

Finally, regarding the quantification of damages, Article 951 of the Civil Code expressly establishes, through reference to Articles 948–950, that the professional who causes the death of the patient, or any injury or disability, shall make the following reparations:

> Article 948
> In the event of death, the indemnification consists in, without excluding other reparations:
> I – payment of expenses for the treatment of the victim, his funeral and the mourning of the family;
> II – the supply of food to the people to whom the victim owed them, taking into account the likely duration of the victim's life.
>
> Article 949
> In the event of injury or other health offence, the offender shall indemnify the treatment expenses and lost profits until the end of the convalescence, in addition to other losses.
>
> Article 950
> In the event of a defect preventing the victim from exercising his or her profession or decreasing his or her ability to work, the compensation, in addition to treatment expenses and loss of profits until the end of the convalescence, shall include a pension corresponding to the importance of the work for which the victim is incapacitated, or the depreciation suffered.
> In response to the covid-19 pandemic, Law No. 14510/2022 was issued on 27 December 2022, allowing the provision of online medical assistance.

According to the Law, the provision of online medical assistance requires the consent of the patient or the patient's legal representative, and must be carried out under the authority of the responsible medical practitioner. The Law also provides that patients' personal data must be protected, in accordance with Law No. 13709/2018, the Brazilian General Data Protection Law (LGPD). Thus, the above-mentioned liability regime applicable to medical practitioners also applies in the case of treatment carried out through telemedicine consultations.

### iii Banking and finance professionals

According to Article 3, Section 2 of the Consumer Defence Code, banking activity is governed by the Code, regardless of the credit operation practised, as stated in Superior Court of Justice Binding Precedent No. 297.

Banks' liability is strict, according to Article 14 of the Consumer Defence Code, which establishes the general rule that 'the service provider responds, regardless of the existence of fault, for the repair of damages caused to consumers by defects in the rendering of services, as well as by insufficient or inadequate information on their use and risks'.

The liability of banking institutions can only be waived if there is proof of non-existence of a defect in the service or if the consumer or third party's exclusive fault is established in accordance with Section 3 of Article 14.

The Superior Court of Justice has also issued Binding Precedent No. 479, which states that 'financial institutions are strictly liable for damage caused by fortuitous internal fraud and offences committed by third parties in banking transactions'. The Superior Court of Justice reaffirmed this understanding when judging the case in REsp 1,837,461, on 25 August 2020.

### iv Computer and information technology professionals

There is no specific regulation of computer and information technology professions, nor any applicable professional council.

The purpose of the ongoing Bills Nos. 5101/2016 and 3065/2015 is to regulate the profession of systems analysts and others related to it. These Bills aim to regulate the technical and training requirements necessary for the exercise of the profession and the creation of the Federal Informatics Council and regional computer science councils, agencies that would be responsible for supervising the exercise of the professions. However, there is no provision regarding the civil liability of such professionals.

Therefore, the general liability regime based on the assessment of fault applies to computer and information technology professionals.

### v Real property surveyors

There is no professional category of real property surveyors in Brazil. Engineers and architects generally carry out this kind of work, and their responsibilities are addressed in Section II.vi.

### vi Construction professionals

Engineers, architects and contractors who assign a construction agreement are required to provide results, as the work must be delivered in accordance with the contracted project and the agreed term.

The fulfilment of the obligation will be discharged not only upon completion of the work but also upon achievement of the purpose for which the professional was hired. Therefore, the professional will only be exempted from liability when there is a fortuitous event, *force majeure*, exclusive fault of the victim or third-party act.[31]

The contractor's liability is different from that of the designer. If design defects arise from a design error and cannot be detected by the contractor, the designer will be liable. However, if the irregularities could have been identified during the work by the contractor – appointed by the designer and working under the designer's supervision – the responsibility shall be joint and several.[32]

In this context, Article 622 of the Civil Code establishes that 'if the execution of the work is entrusted to third parties, the author's responsibility for said project shall be limited to damages resulting from defects set out in Article 618, if the author is not in charge of leading or supervising the project'.

Finally, Article 618 of the Civil Code establishes that liability shall be objective in building contracts or for other significant constructions where the material and execution provider shall be liable for the soundness and safety of the work, and for the materials and the soil, for the irreducible period of five years. In these cases, the provider will respond for a period of five years, with the owner of the project having 180 days to file a lawsuit, pursuant to Article 618.

In recent years, during the coronavirus pandemic, the execution of engineering work contracts was severely impacted, with the adoption of social distancing measures affecting service completion deadlines. Article 393 of the Civil Code provides that, in cases of acts of God or *force majeure*, the parties are exempted from liability for breach of contract and the enforceability of obligations is suspended or the contract must be terminated, depending on whether the impediment is temporary or definitive. Note, however, that in the context of the pandemic the application of Article 393 should be discussed in each specific case to verify whether the breach of the contract was in fact caused by the pandemic or if other causes were determinant.

### vii Accountants and auditors

The profession of accountant is regulated by Decree-Law No. 9295/1946, which requires professionals to prove their attainment of a bachelor's degree in accounting sciences, approval in the sufficiency examination and registration with a regional accounting council.

The above-mentioned Decree-Law also created the Federal Accounting Council and the regional councils – administrative agencies responsible for monitoring the exercise of the accounting profession.

Law No. 6385/1976, which regulates the securities market in Brazil, establishes in Article 26 that 'only accounting firms or independent accounting auditors registered at the Brazilian

Securities Commission may audit the financial statements of publicly held companies and of institutions, companies or corporations that make up the system of distribution and intermediation of securities, for the effects of this Law'.

Furthermore, Paragraph 2 of Article 26 provides that these professionals 'shall be subject to civil liability for any losses caused to third parties as a result of fraud or fault in the exercise of the functions provided for in this article', thereby adopting the personal, or subject-based, liability regime.

In this regard, the Superior Court of Justice has decided that in cases of audit service the personal liability regime applies as long as there is evidence of fault, damage and causal link with the opinion or audit report issued.[33]

### viii Insurance professionals

On 11 November 2019, the President of Brazil issued Executive Order No. 905, revoking Law No. 4594/1964 and partially revoking Decree Law No. 73/1966, which used to regulate insurance brokerage. The decision to deregulate the insurance profession in Brazil was taken to improve efficiency in public management and concentrate efforts on activities requiring specific regulation.

However, Executive Order No. 905 was provisional and should have been ratified by Congress within 120 days to become final. This deadline expired on 20 April 2020, but the President had revoked the Executive Order before this date, as Congress would not have had the opportunity to vote on it. This meant that Law No. 4594/1964 and Decree Law No. 73/1966 became effective again, and insurance brokerage continues to be regulated.

Therefore, at present, insurance brokers are regulated by Law No. 4594/1964,[34] Decree-Law No. 73/1966 and the resolutions and rules issued by the National Council of Private Insurance and the Superintendence of Private Insurance (SUSEP).

According to Article 1 of Law No. 4594/1964, the insurance broker, a legal person or entity 'is the intermediary legally authorised to get customers and promote insurance contracts, admitted by the legislation in force, between insurance companies and individuals or public or private legal entities'. The exercise of the profession is subject to obtaining prior qualification and registration with the self-regulating insurance brokerage entities or with SUSEP, under the terms of Article 123 of Decree-Law No. 73/1966.

Civil liability of insurance brokers is regulated by Article 126 of Decree-Law No. 73/66, which applies the fault liability regime. Article 127 also establishes the professional responsibility of the broker for non-compliance with laws, regulations and resolutions in force.

Furthermore, Article 20 of Law No. 4594/64 specifically states that 'the broker shall be professionally and civilly liable for inaccurate declarations contained in proposals signed by him, regardless of the sanctions that may be applicable to others responsible for the infraction'. In addition, case law understands that the joint liability between insurance brokers and insurers is exceptional, and shall be acknowledged only in cases of non-compliance with the contractual obligations or if the insurance broker creates for the insured an expectation that he or she is responsible for the indemnity payment.[35]

In contrast, the actuarial profession is regulated by Decree-Law No. 806/1969 and Decree No. 66408/1970, which define the requirements for the exercise of the profession and the activities of the professional actuary. As there is no specific liability regime, the applicable general regime is provided by both the Civil Code and, where relevant, the Consumer Defence Code.

## Year in review

### i Legislative changes

Brazil has a civil law legal system; therefore, its primary source is codified law. Consequently, and considering the complex legislative procedure required to change the law, the legal framework for professional liability does not undergo frequent modification.

Nonetheless, significant legislative changes and debates about legislative proposals have been taking place recently.

A notable legislative change was the enactment of the LGPD, which is inspired by the European General Data Protection Regulation. The LGPD came into force on 18 September 2020, and the application of administrative sanctions began on 1 August 2021, pursuant to Law No. 14010/2020. After more than two years of *vacatio legis*, this law, which aims to protect individuals' freedom, privacy and personal development by giving them more control of their personal information, is already impacting on several sectors and industries that process personal data. Among these, the medical market has undeniably been affected; for example, Law No. 14510/2022 expressly stipulates that the provision of online medical assistance is permitted on the condition that the patients' personal data is protected. The insurance, reinsurance and brokerage markets are also affected and, therefore, must adapt to the provisions of the LGPD.

In addition, under Bill No. 21/2020, the legal framework for artificial intelligence (AI) is under discussion in Congress. The project aims to regulate AI in the country and, in terms of liability, provides for the application of the fault-based regime to agents working in the chain of development and operation of AI systems.

Furthermore, the local insurance market is currently undergoing a process of deregulation, and Brazilian insurance authorities have been issuing important rules focusing on transparency, modernisation and free competition in the market; for example, in the past year, these have included new rules on mass insurance[36] and large risks insurance.[37] Moreover, a new circular was published in 2021 providing new rules applicable to civil liability insurance,[38] including professional liability insurance.

In this regard, Law No. 14430/2022 was enacted on 3 August 2022. Among other provisions, this Law introduced amendments regarding insurance broker activities by modifying provisions of Law No. 4594/1964 and Decree Law No. 73/1966; for instance, under Article 1 of Law No. 4594/1964, the scope of the role of the professional insurance broker, now extends to: (1) identification of the risk and interest to be guaranteed; (2) recommendation of measures to be taken to ensure obtaining an insurance guarantee; (3) identification and recommendation of the type of insurance that best meets the needs of the insured and the beneficiary; (4) identification and recommendation of a suitable insurer;

(5) provision of assistance to the insured during the execution and duration of the contract, and during the adjustment and settlement of claims; and (6) provision of assistance to the insured in renewing and preserving the guarantee covering the interest insured.

### ii Relevant case law

As stated in Section I.iv, specifically regarding obligations of means, both doctrine and case law have seen application of the theory of loss of chance to quantify compensation.

In this regard, the Superior Court of Justice, in a decision in March 2022, sentenced three lawyers from a law firm to pay 500,000 reais for the loss of a chance.[39]

According to the decision, the lawyers had not acted in a lawsuit for almost three years, and had failed to present motions about the expert evidence or appeal against the decisions. In addition, the indemnification amount – 500,000 reais – was stipulated as a result of the analysis of the degree of fault of the lawyers and the chance of success had they acted properly in the case. The complete failure by the attorneys to present a defence deprived their clients of the chance to have their losses mitigated by an amount of at least 50 per cent. Thus, considering that the amount at risk in the lawsuit was around 1million reais, the lawyers were ordered to pay 500,000 reais as indemnification.

In May 2022, the Superior Court of Justice issued another notable precedent,[40] stating that lawyers may be liable for moral damages arising from offences committed against judges in lawsuits.

## Outlook and future developments

The covid-19 outbreak has raised new questions in all sectors of society, especially regarding labour relations and the risks associated with pandemic scenarios and corresponding risks on a global scale. Despite the fact that the covid-19 pandemic is now under control, it is clear that reflecting on more than three years' experience of the pandemic and the debates that it has raised will continue over time, giving rise to legislative and regulatory changes. In this regard, an increase is expected in litigation and decisions rendered by the higher courts involving medical malpractice, information technology (IT) providers' and lawyers' liability. The new hybrid workplace model adopted by various sectors in Brazil is also expected to remain in place, creating increased risks of professional liability due to higher levels of exposure to threats of cyberattacks and data breaches.

Moreover, subsequent to Bill No. 1998/2020 on telemedicine and associated professional liability, Law No. 14510/2022 was issued on 27 December 2022. This legislation draws on both real-life experience of the pandemic and the increase in use and developments in technology in the country. Among other things, this Law regulates the provision of online medical assistance by health professionals in all areas and expressly provides for the liability of medical practitioners.

Concurrently, debates involving topics such as AI, data protection, liability of online content providers and other matters related to the telecommunications era are also gaining more and more attention; for example, the liability of digital influencers (a relatively new category of professional directly linked to internet platforms) is currently under discussion

by scholars. In the context of technological developments, it must be emphasised that regulation is pending on large language models and generative pre-trained transformers, which provide frameworks for generative AI chatbots such as ChatGPT, and the growing use of this technology by professionals in different areas is already giving rise to debates about professional liability and associated risks.

In this context, professional liability insurance, also known as errors and omissions (E&O) insurance, may also face an increase in demand following the risks arising from the pandemic, AI and the emergence of new categories of professions. E&O insurance is commonly retained by professionals such as lawyers and accountants, and by health professionals such as doctors, nurses and dentists, as well as by hospitals and clinics. In addition to these professionals, we have seen the creation of new products by insurance companies to provide coverage for new professional categories, such as IT providers, real state managers and freight forward carriers. The purpose of the insurance is to provide financial protection to insureds arising from failures committed in the exercise of their profession. Its scope is to guarantee the insured with the reimbursement of compensation paid to a third party because of the occurrence of failure or a professional error, in addition to the defence costs incurred through claims filed by third parties. Thus, by means of this insurance, the insured's assets will be protected in the event that the insured is found liable to compensate the client for a professional failure. Therefore, the E&O insurance shall assume greater significance as an important instrument in the management and mitigation of new professional risks.

## Endnotes

1. Marcia Cicarelli and Camila Affonso Prado are senior partners and Laura Pelegrini is a senior associate at Demarest Advogados. ^ Back to section

2. Cavalieri Filho, Sergio.*Programa de responsabilidade civil*. 7 ed. São Paulo: Atlas, 2007, pp. 358–359. ^ Back to section

3. Vaneska Donato de Araujo explains that a freelancer is 'one who works independently, in an autonomous manner, and who exercises his activity with full freedom, choosing the clients he will meet, determining the value of the service rendered, and other conditions of the contract to be entered into with the creditor'. Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, p. 157. ^ Back to section

4. Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, pp. 154–155. ^ Back to section

5. Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', masters' dissertation, Law School of the University of São Paulo, 2011, p. 156. ^ Back to section

6 Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, p. 164. Back to section

7 Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, p. 167. Back to section

8 Superior Court of Justice, AREsp 1.494.228, Judge Antonio Carlos Ferreira, ruling: 14 February 2022. Superior Court of Justice, AREsp 1.012.271, Judge Maria Isabel Gallotti, ruling: 18 February 2020. Superior Court of Justice, AgInt REsp 1.616.060 SC 2016/0193749-9, Judge Maria Isabel Gallotti, ruling: 16 December 2022. Back to section

9 Superior Court of Justice, AREsp 1.732.387, Judge Paulo de Tarso Sanseverino, ruling: 25 February 2021. Superior Court of Justice, AREsp 2.147.579 RJ 2022, Judge Marco Aurélio Bellizze, ruling: 30 August 2022. Back to section

10 Superior Court of Justice, AgInt AREsp 1.500.181, Judge Marco Aurélio Bellizze, ruling: 22 June 2021. Superior Court of Justice, REsp 1.639.323, Judge Luis Felipe Salomão, ruling: 2 June 2020. Superior Court of Justice, AREsp 1.796.927, Judge Moura Ribeiro, ruling: 26 October 2022. Superior Court of Justice, AREsp 2.132.266, Judge Marco Buzzi, ruling: 4 April 2023. Back to section

11 Superior Court of Justice, AgInt AREsp 1.633.302, Judge Raul Araújo, ruling: 1 March 2021. Superior Court of Justice, AgInt AREsp 438.665, Judge Luis Felipe Salmoão, ruling: 24 September 2019. Superior Court of Justice, AREsp 2.236.854, Judge Marco Buzzi, ruling: 2 December 2022. Superior Court of Justice, EDcl AREsp 2.078.964 CE 2022/0055809-5, Judge Ricardo Villas Boas Cueva, 23 January 2023. Back to section

12 Superior Court of Justice, AgInt AREsp 964.738, Judge Marco Buzzi, ruling: 7 June 2021. Superior Court of Justice, REsp 1.975.928 BA 2021/0382618-8, Judge Marco Aurélio Bellizzi, ruling: 1 March 2023. Superior Court of Justice, CC 196.358, Judge Raul Araújo, ruling: 25 April 2023. Back to section

13 Superior Court of Justice, REsp 1.877.375, Judge Nancy Andrighi, ruling: 8 March 2022. Superior Court of Justice, AREsp 2.214.851 DF 2022/0299958-1, Judge Maria Isabel Galloti, ruling: 20 December 2022. Superior Court of Justice, AgInt AREsp 1.737.042, Judge Moura Ribeiro, ruling: 11 May 2022. Back to section

14 Savi, Sérgio.*Responsabilidade civil por perda de uma chance*. São Paulo: Atlas, p. 63 and p. 80. Back to section

15 Superior Court of Justice, REsp 1.677.083, Judge Ricardo Villas Bôas Cueva, ruling: 14 November 2017. Back to section

**16** Dias, José de Aguiar.*Da responsabilidade civil*. 12 ed. Editora Lumen Juris: Rio de Janeiro, 2011, pp. 353–354. ^ Back to section

**17** Here are the terms of the binding precedent proposal: 'It violates the Federal Constitution to attribute liability to the lawyer for issuing a legal opinion or advice, without concrete evidence of the link between the opinion issued and the illicit purpose' (available at: https://www.conjur.com.br/dl/oab-sumula-advogados-parecer.pdf; last accessed on 22 April 2022). ^ Back to section

**18** Superior Court of Justice, REsp 1.354.283, Judge Antonio Carlos Ferreira, ruling: 1 July 2019. Superior Court of Justice, AREsp 1.722.332/MT, Judge Maria Isabel Galloti, ruling: 21 June 2022. Superior Court of Justice, AREsp 2.174.022 SP 2022/0225882-1, Judge Assusete Magalhães, ruling: 29 September 2022. ^ Back to section

**19** Gonçalves, Carlos Roberto.*Responsabilidade civil*. 9 ed. São Paulo: Saraiva, 2006, p. 393. ^ Back to section

**20** Dias, José de Aguiar.*Da responsabilidade civil*. 12 ed. Editora Lumen Juris: Rio de Janeiro, 2011, p. 359. ^ Back to section

**21** Cavalieri Filho, Sergio.*Programa de responsabilidade civil*. 7 ed. São Paulo: Atlas, 2007, p. 377. Diniz, Maria Helena. *Curso de Direito Civil Brasileiro: Responsabilidade Civil*. 21 ed. São Paulo: Saraiva, 2007, pp. 295–298. ^ Back to section

**22** Superior Court of Justice, REsp 1.848.862, Judge Marco Aurélio Bellizze, ruling: 8 April 2022. Superior Court of Justice, AREsp 2.199.600 PR 2022/0273543-2, Marco Aurélio Bellizze, ruling: 30 November 2022. ^ Back to section

**23** Superior Court of Justice, REsp 1.698.726, Judge Ricardo Villas Bôas Cueva, ruling: 1 June 2021. Superior Court of Justice, AgInt AREsp 1.649.072, Judge Luis Felipe Salomão, ruling: 13 August 2020. Superior Court of Justice, AREsp 2.039.710 RJ 2021/0389471-5, Judge Marco Buzzi, ruling 3 May 2022. Superior Court of Justice, AREsp 2.318.578, Judge Marco Aurélio Bellizze, ruling: 11 April 2023. ^ Back to section

**24** Venosa, Sílvio de Salvo.*Direito Civil: Responsabilidade Civil*. 14 ed. São Paulo: Atlas, 2014, p. 148. ^ Back to section

**25** Superior Court of Justice, AREsp 1.508.421, Judge Raul Araújo, ruling: 31 August 2020. Superior Court of Justice, AgInt AREsp 1.095.904, Judge Maria Isabel Gallotti, ruling: 22 March 2018. ^ Back to section

**26** Superior Court of Justice, Judge Marco Aurélio Bellizze, ruling: 11 October 2021. Superior Court of Justice, AREsp 1.593.936, Judge Moura Ribeiro, ruling: 3 February 2020. ^ Back to section

**27** Venosa, Sílvio de Salvo.*Direito Civil: Responsabilidade Civil*. 14 ed. São Paulo: Atlas, 2014, p. 168. Back to section

**28** Superior Court of Justice, REsp 1.790.014, Judge Paulo de Tarso Sanseverino, ruling: 11 May 2021. Superior Court of Justice, REsp 605,435, Judge Nancy Andrighi, p. 2 of Judge Raul Araújo vote, ruling: 14 September 2011. Back to section

**29** Superior Court of Justice, REsp 1.184.932, Judge Castro Meira, ruling: 13 December 2011. Back to section

**30** Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, pp. 217–218. Back to section

**31** Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, pp. 217–262. Back to section

**32** Araujo, Vaneska Donato de, '*A responsabilidade civil professional e a reparação de danos*', master's dissertation, Law School of the University of São Paulo, 2011, pp. 217–272. Back to section

**33** Superior Court of Justice, REsp 1.281.360, Judge Luis Felipe Salomão, ruling: 21 June 2016. Back to section

**34** As recently amended by Law No. 14430/2022. Back to section

**35** Superior Court of Justice, AgInt EDcl REsp 1.823.953, Judge Moura Ribeiro, ruling: 19 October 2020. Superior Court of Justice, AREsp 723.308 SP 2015/0131445-0, Judge Raul Araújo, ruling: 2 March 2023. Back to section

**36** Circular SUSEP No. 621/2021. Back to section

**37** Resolution CNSP No. 407/2021. Back to section

**38** Through SUSEP Circular No. 637/2021. Back to section

**39** Superior Court of Justice, REsp 1.877.375. Back to section

**40** This lawsuit is currently confidential and the precedent is not publicly available. A summary of the case can be found on the Superior Court website: https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/13052022-Excessos-do-advogado-nao-sao-cobertos-pela-imunidade-profissional-e-podem-gerar-responsabilizacao.aspx. Back to section

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# Denmark

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## Summary

**INTRODUCTION**
**SPECIFIC PROFESSIONS**
**YEAR IN REVIEW**
**OUTLOOK AND FUTURE DEVELOPMENTS**
**ENDNOTES**

# Introduction

## i Legal framework

In Danish law, a claim for professional negligence can be brought under a contractual or non-contractual relationship.

Contractual claims usually arise when the professional is required to perform a task under a contract and has failed to do so.

Non-contractual claims usually arise from an act or omission contrary to a profession's standard of good practice. Such a standard can have various sources, such as statute,[2] Ministerial Orders and rules of professional bodies.

The general comparator used is that of the reasonably competent professional. However, the comparator when providing specialist advice is usually that of the reasonably competent specialist.

The burden of proof generally lies with the plaintiff. However, under certain circumstances, the defendant will be presumed to be negligent and the burden of proof will thus shift to the defendant. The burden shifts to the defendant on a case-by-case basis and will often be based on considerations such as which of the parties is in the best position to secure evidence, whether the defendant complied with a rule or regulation, or whether the defendant's act was exceptionally hazardous or dangerous.[3]

As regards the standard of proof, there is no general rule and it is usually for the court to set the standard.[4] The court often appoints an expert to assist in determining whether that standard is fulfilled.

Common defences against professional negligence claims, whether contractual or not, include lack of proof, estoppel and failure to bring a claim in time.

Exclusion of liability is possible only in contract. Such contractual exclusion must be reasonable and is invalidated by gross negligence or intention to cause damage.

## ii Limitation and prescription

The Limitation Act[5] is the principal act for limitation periods, including claims pertaining to professional negligence. In general, the limitation period is three years,[6] from breach of contract for contractual claims,[7] or from when the harm occurred for non-contractual claims.[8] If the plaintiff is factually unaware of the claim, the limitation period normally commences from when the plaintiff becomes or should have become factually aware,[9] but the period can only be extended in this way up to a maximum of 10 years (30 years for personal injury claims and environmental damage).[10]

## iii Dispute fora and resolution

Depending on the profession, there are disciplinary boards, which assess whether a professional has acted in accordance with the rules of his or her profession, and there are complaints boards, which assess a professional's service, mainly in cases brought

by consumers. Not every profession has a disciplinary board or a complaints board, and certain professions have a combined board.

Where the boards exist, they are often the first step when resolving a professional negligence dispute, and they each have their own rules of procedure.

If a claim of professional negligence is not assessed at a disciplinary or complaints board, or a party is not satisfied with the assessment made by the relevant board, a party can generally bring the claim before the Danish courts according to the standard court rules of procedure. This entails that the Administration of Justice Act applies,[11] and the claim normally begins at the competent district court. The court is not bound by a board's decision.[12]

Arbitration is often used to resolve construction disputes, but arbitration and mediation are not common dispute fora for professional negligence otherwise.

### iv Remedies and loss

The remedies generally available to the parties depend on whether a claim is brought in contract or not.

For a contractual claim for professional negligence, a plaintiff generally has two options. The first is to be placed in the position as if the contract had been completed and the second is for the plaintiff to be placed in a position as if the contract had never been entered into, both through an award of damages.[13] If there has been a contractual material breach, termination is also possible.

For a non-contractual claim, the general remedy is to place the harmed party in the position as if the harm had not occurred. Remedies include damages and injunctions.

For all damages for professional negligence, causation and remoteness principles apply, there is a duty to mitigate loss,[14] and one cannot be unduly enriched from a negligent act.

## Specific professions

Each profession is often distinct and complex in how it approaches professional negligence. For reference purposes, the sector descriptions below highlight specific details. These details include applicable legislation, professional bodies that represent their members and often lobby on their behalf, standards of good practice that often must be breached to obtain a successful claim, disciplinary and complaints boards, and the required insurance.

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### i Lawyers

The Administration of Justice Act sets out the conduct required of a lawyer admitted to the Danish Bar, which includes performing a task thoroughly, in good conscience and with the appropriate client care.[15] The Danish Bar and Law Society is the body that expands upon this standard of good practice to include rules on client privilege, conflicts of interest, fees, confidentiality, etc. The professional body for lawyers is the Association of Danish Law Firms that works for the interests of law firms, their owners and employees.

The Danish Bar and Law Society has a combined board, which handles complaints regarding lawyers' conduct and billing. A decision of the board regarding conduct may only be contested by the lawyer in the courts.

Lawyers are required to have liability insurance of a minimum 2.5 million kroner, including for a period of five years after giving up practice.[16]

### ii Medical practitioners

The Act on Complaints and Claims in Healthcare[17] covers negligence within the medical profession. Section 19 of the Act states that it generally covers every treatment of a healthcare professional who is a part of the Danish healthcare system. There are various professional bodies in the medical sector that work for the interests of their members, an example for doctors is the Danish Medical Association.

The Act sets out the way in which medical professional negligence differs from other professions. For example, there is a statutory standard of proof for a successful claim for damages, namely more than 50 per cent probability;[18] and the Act states that even if the professional is a generalist, the relevant comparator is an experienced specialist.[19]

There are three boards in the Danish healthcare system: one disciplinary; and two complaints, of which the first is for compensation and the second is for compensation appeals. It is these boards, along with two advisory boards,[20] that contribute to the understanding of what is the standard of good practice for medical professionals.

Private medical practices, hospitals and clinics must have liability insurance of a minimum of 20 million kroner per year,[21] but public practices (run by the state, municipalities, etc.) are not obliged to have such insurance.[22]

### iii Banking and finance professionals

The Financial Business Act[23] regulates all financial businesses such as banks (both retail and investment), insurance companies, mortgage providers and investment services companies.[24]

The relevant standard of good practice is derived from Chapter 6 of the Act, which sets out the requirement for financial businesses to act in accordance with good business practices. As regards specific activities, the standard is at times further developed by Ministerial Orders.[25]

There are various bodies that further the interests of banking and finance professionals; two examples are Insurance & Pension Denmark, and Finance Denmark. There are also different complaints boards for different financial activities (e.g., mortgages and investment funds).

One example of liability insurance within this sector concerns investment advisers, who must be covered at a minimum of 7.5 million kroner per negligent act and at a minimum of 11.2 million kroner for the combined number of negligent acts, per year.[26]

### iv Computer and information technology professionals

There is not one act, standard of good practice or mandatory insurance scheme that applies to the whole sector of computer and information technology (IT) professionals; disparate pieces of legislation apply. Legislation to bear in mind when looking for a standard of good practice, and if related to the case, includes the Act on Electronic Communications and Services,[27] which sets out rights and obligations regarding internet access and the electronic provision of information or content. For considerations of data fraud, the Criminal Code contains relevant sections.[28]

There are certain bodies such as the Danish ICT Industry Association and the Telecom Industry Association that comment on legislation and play a lobbying role for their members, in a similar manner to the above-mentioned association Insurance & Pension Denmark, and the Association of Danish Law Firms.

There are no disciplinary or complaints boards specifically only for computer and IT professionals, and so disputes would proceed directly to the courts, unless otherwise agreed by the parties. If the case concerns data protection breaches, they can be forwarded to the Danish Data Protection Agency.

### v Real property surveyors

Real property surveyors are not known as a specific profession in Denmark. Various professions cater for real property in Denmark and this section focuses on real estate agents and building experts, as these serve functions most comparable to those of real property surveyors.

The tasks of real estate agents include appraising, negotiating sales and purchases, contacting mortgage providers and drafting sale contracts. A principal task of a building expert is to draft the structural survey in connection with a property's sale.

The Danish Association of Chartered Estate Agents represents real estate agents and the Act on Sale of Real Property regulates these agents as regards consumer cases.[29] Section 24 of the Act sets out the standard of good practice and Chapter 5 provides specific rules for areas that could give rise to professional negligence claims (e.g., Section 27 sets out rules for the appraisal of property and Section 35 sets out rules for conflicts of interest). Real estate agents have both a disciplinary board and a complaints board.[30]

Ministerial Order No. 1537 of 9 December 2015 provides the basis for the requirement that real estate agents must have liability insurance, of a minimum amount of 3 million kroner per year.[31] The minimum amount is 30 million kroner per year if real estate agents have 10 or more employees.[32]

As regards building experts, the relevant legislation is the Act on Licensed Building Experts with its related Ministerial Order.[33] Section 11 of the Ministerial Order sets out in specific terms how building experts should conduct their work, which provides a basis when

considering the standard of good practice. The Association for Building Experts and Energy Consultants is an applicable professional body.

The building experts' combined board assesses cases regarding whether building experts have or have not fulfilled their obligations pursuant to the Act on Licensed Building Experts and to the Act on Consumer Protection when Buying Real Estate.[34] The board can criticise, caution and fine building experts up to 100,000 kroner, as well as assess contested structural surveys.[35]

Building experts' liability insurance for structural surveys is required to be that ordinarily attainable in the insurance market, for a period of five years after the sales connected with the building expert's survey.[36]

### vi Construction professionals

There is no general legislation under Danish law that governs the relationships between the parties in a construction project.[37] Instead, a government committee comprising both governmental and non-governmental members has developed sets of default general contractual conditions. The most common standards include AB 18, a set for building and construction works and supplies,[38] and ABT 18, a set for design and build contracts.[39]

Clause 12 of both AB 18 and ABT 18 sets out a standard of good practice that is the default if nothing specific is set out in the contractual terms or otherwise agreed by the parties. The standard is that work must be executed in accordance with the contract, good professional practices and the client's instructions. The assessment of good professional practice depends on each construction profession's requirements regarding applicable legislation, rules, guidelines, customs, etc.

Pursuant to Clause 11(1) of both AB 18 and ABT 18, insurance must be bought by the client for fire and storm damage, and the contractor must have the usual liability insurance.[40] However, further insurance can be made part of the agreement.[41]

Clause 69 of AB 18 and Clause 67 of ABT 18 provide for arbitration at the Danish Building and Construction Arbitration Board as the default dispute resolution mechanism, which parties often leave unchanged when adapting the conditions.

Outside the general contractual conditions, three complaints boards are relevant. One deals with electricians and plumbers for claims up to 150,000 kroner, and two others deal with construction professionals such as painters, masons and carpenters, for claims up to 1 million kroner.[42]

The Danish Construction Association is the employers' organisation and its members comprise: major building contractors, small and medium-sized construction companies and manufacturers of building components.

### vii Accountants and auditors

The standard of good practice for accountants and auditors[43] is influenced by applicable legislation, such as Section 361(2) of the Companies Act[44] as regards accountants within limited liability companies and Section 16 of the Act on Approved Auditors and Audit Firms,-[45] which requires skills of accuracy and swiftness, as adapted to the particular task. The

standard is partly defined by the code of conduct of the regulatory and professional body of the Institute of State Authorised Public Accountants. The Institute has an expert committee, to which parties can pose questions and a court can take the committee's answers into account when deciding the standard.

The disciplinary board for accountants is the Accounting Practices Board,[46] to which claims can be brought regarding an accountant's statements and his or her related advice.

Accountants are obliged to hold insurance when acting within the scope of the Act on Approved Auditors and Audit Firms. Accountant companies with fewer than 10 qualified accountants must have a minimum cover of 2 million kroner, and companies with 10 qualified accountants or more must have a minimum cover of 20 million kroner, per year.[47]

### viii Insurance professionals

Insurance companies are included in the Financial Business Act.[48] The Act on Insurance Brokerage applies to independent insurance brokers.[49] These brokers have a separate standard of good practice[50] and a separate professional body, the Danish Association for Insurance Brokerage. The complaints board for independent insurance brokers is the Insurance Complaints Board.

According to Section 3(2)(3) of the Act on Insurance Brokerage, an insurance broker shall hold professional indemnity insurance covering potential financial claims resulting from the business. The minimum cover is 9,717,934 kroner per negligent act and at least 14,382,525 kroner for the combined number of negligent acts, per year.[51]

## Year in review

Highlights this year arise from the management and legal sectors. Supreme Court cases affirm that a bank management's business judgement can be overruled if undue considerations were the basis for decisions. A high court case may afford lawyers some relief with a judgment on the provision of advice on prenuptial agreements.

Highlights this year arise from the management and legal sectors. Supreme Court cases affirm that a bank management's business judgement can be overruled if undue considerations were the basis for decisions. A high court case may afford lawyers some relief with a judgment on the provision of advice on prenuptial agreements.

### i Management

#### Business judgement rule

In the wake of the financial crisis, several Danish banks were wound up and taken over by the state-owned company Financial Stability, to ensure the stability of the Danish economy. Following the banks' takeover, Financial Stability initiated legal proceedings for professional liability and mismanagement regarding certain banks.

One such bank was Roskilde Bank and, on 24 February 2010, Financial Stability initiated legal proceedings against the bank's former board members and management. The dispute

concerned whether the former bank director (A) and four former board members were liable for (1) approving six loans in connection with the bank's sale of its own shares to four of the bank's largest clients (equity loans), with all loans having been granted without prior credit assessment, and (2) entering into credit agreements with H, an employee of the bank. One of the credit arrangements was a loan for 72 million kroner for H to acquire shares in Roskilde Bank, despite H already having borrowed 45 million kroner from the bank to purchase shares in Roskilde Bank worth 53 million kroner at the time of the grant of the loan. To minimise the bank's risk, however, the credit agreement with H did contain a stop-loss clause, according to which Roskilde Bank was entitled to sell H's shares if the share price fell below a given threshold.

The Supreme Court applied the business judgement rule,[52] as it has done in previous judgments regarding management liability.[53] The business judgement requires that courts must exercise caution in overruling a management's business judgement but that such caution shall not be exercised if it must be assumed that the management took into account undue considerations as regards the managed organisation (in this case, the bank).

The Supreme Court found that director A had acted negligently in approving the six loans, as he had approved the loans without any prior credit assessment of the borrowers. The reason that the credit assessments were not carried out was that A had made a decision for the bank to approach its large business customers with the intention of selling the bank's own shares to them; therefore, the bank had offered to finance the share purchase without a credit rating. As the Eastern High Court found, to extend a rating of creditworthiness without having conducted an immediately preceding credit assessment is irresponsible. The former director A was therefore ordered to pay damages of approximately 230 million kroner to Financial Stability.

However, the board members were all acquitted, as the Supreme Court did not find it proven that the board members were aware that no prior credit assessment had been conducted for the loans. The Supreme Court therefore did not find the board member's subsequent approval of the loans irresponsible.

In relation to the credit agreement with H for 72 million kroner, the Supreme Court found that it had been irresponsible of A to grant the loan to H and for the board members to approve the loan. However, both A and the board members were acquitted, as the Supreme Court found that it had been reasonable for the parties to assume that the bank's employees would trigger the stop-loss clause under the credit agreement once the share price of Roskilde Bank started to fall drastically in the period following the grant of the loan. The Supreme Court found that this would have prevented or mitigated the loss altogether and, therefore, neither A nor the board members could be held liable for this loss.

In relation to a second loan made by Roskilde Bank to H, which was entered into following the dramatic fall of the bank's share price, the Supreme Court applied the business judgement rule and found that the board members were not liable because there was no indication that the board members had taken any undue considerations into account when approving this loan.

Overall, this Supreme Court ruling confirms the application of the business judgement rule regarding management liability, namely that courts will assess the reasonableness of the conduct but must exercise caution in overruling a management's business judgement.

Nonetheless, a management's business judgement can be overruled if the management took undue considerations into account in making a credit agreement.

Another case concerned whether the executive manager (A) of a bank had incurred liability for damage to the bank (which had been taken over by Financial Stability in 2009) for three loan agreements granted in the period from 2006 to 2008. The manager A had been acquitted in the high court and the Supreme Court[54] upheld the high court judgment.

The Supreme Court referred in its decision to three Supreme Court cases[55] concerning banks in which a number of principles were established to determine when members of a bank's management can be held liable for the granting of loans. It follows from these cases that:

1. general fault applies to the granting of the loan itself and to the operational processing following the grant of the loan;
2. where a loan is granted without authorisation, it must have been 'unreasonable' for the bank to grant the loan for liability to be imposed; and
3. courts must exercise caution in overruling a management's assessment of whether the available information constituted sufficient basis for the credit agreement, and that caution must be exercised in overriding management's business judgement in granting a loan, but such caution shall not be exercised if management took into account undue considerations.

The Supreme Court found that A did not take into account undue considerations. Therefore, A's liability was to be assessed based on the other principles mentioned above.

With regard to the first loan agreement (of approximately 59 million kroner in 2006 and 2007), the Supreme Court stated that it was not proven that the loans were unreasonable, and that A, who was not responsible for the practical aspects of the loan processing, could not be held responsible for operational errors in connection with the disbursement of the loans.

With regard to the second loan agreement, the Supreme Court found that A was not responsible for providing a loan of approximately 40 million kroner, even though a real estate transaction had not been completed and, therefore, the bank had not obtained the expected collateral.

With regard to the third loan agreement, the Supreme Court found that A was not liable for the granting of a loan of approximately 40 million kroner by the credit manager of the bank without authorisation from A or the bank's board members. The Supreme Court found that it could not be proven that the loan, which was granted before the financial crisis, was unreasonable. Therefore, there was no basis for imposing liability for damages on A regarding this loan agreement.

As with the Supreme Court's ruling in the *Roskilde Bank* case described above, this Supreme Court ruling confirms the business judgement rule regarding management liability, particularly that courts will take into consideration the reasonableness of the conduct.

### ii Law

An attorney (A) provided legal advice to M and H on, inter alia, the creation of a prenuptial agreement and a will. H had previously been the subject of bankruptcy proceedings, and therefore A's advice regarding the prenuptial agreement and the will was for the purpose of securing H's assets against creditors. Attorney A advised that if a prenuptial agreement with separate property were created, there would be a risk that a bankruptcy petition would be filed against H with the aim of having the prenuptial agreement overturned. Thereafter, M informed A that he did not wish to enter into a prenuptial agreement. At issue was the question whether A had advised sufficiently on the consequences of not creating and validly registering a prenuptial agreement between M and H.

The Eastern High Court[56] found that it was relevant for A to include the risk of overturning the prenuptial agreement in the legal advice provided. On the basis of the evidence, however, the high court found that M had indicated to A that a prenuptial agreement regarding separate property should not be created and, therefore, that there was no basis for A to proceed with changing M's and H's property scheme. The high court found it had not been proven that A had acted negligently either by failing to give advice to a greater extent than was given on the creation of a prenuptial agreement regarding separate property or by failing to take steps to create one.

## Outlook and future developments

The cases reviewed provide further insight into professional negligence in Denmark and indicate the range of areas in which disputes may arise in future – from the business judgement rule for management liability to the responsibilities of lawyers when providing legal advice.

### Endnotes

1. Jacob Skude Rasmussen is a partner and Catherine Schutz is a senior legal consultant at Gorrissen Federspiel. The authors acknowledge the valuable assistance of dispute resolution consultant Andrew Poole and assistant attorney Alexander Højmark in producing this chapter. ^ Back to section

2. For example, regarding lawyers, see Section 126 of the Administration of Justice Act, Consolidated Act No. 1655 of 25 September 2022 with later amendments. ^ Back to section

3. See Andreas Bloch Ehlers,*Grundlæggende erstatningsret* (Copenhagen: Karnov, 2019), p. 91. ^ Back to section

4. See Bo Von Eyben and Helle Isager,*Lærebog i Erstatningsret*, 9th ed. (Copenhagen: Jurist-og Økonomforbundets Forlag, 2019), p. 136f. ^ Back to section

5. Consolidated Act No. 1238 of 9 November 2015 with later amendments. ^ Back to section

6. See Section 3(1) of the Limitation Act. ^ Back to section

**7** See Section 2(3) of the Limitation Act. ^ Back to section

**8** See Section 2(4) of the Limitation Act. ^ Back to section

**9** See Section 3(2) of the Limitation Act. ^ Back to section

**10** See Section 3(3)(1)–(4) of the Limitation Act. The limitation period for damages claims arising from pollution of the environment will run from the time the environment is polluted. ^ Back to section

**11** Consolidated Act No. 1655 of 25 September 2022. ^ Back to section

**12** For example, regarding accountants, see Amalie Kjær Hassager, Jakob Lentz and Lars Kiertzner,*Revisoransvar*, 9th ed. (Copenhagen: Karnov, 2021), pp. 631–632. ^ Back to section

**13** See Mads Bryde Andersen,*Grundlæggende Aftaleret*, 5th ed. (Copenhagen: Gjellerup Forlag, 2021), p. 110f. ^ Back to section

**14** See Vibe Ulfbeck,*Erstatningsretlige Grænseområder*, 3rd ed. (Copenhagen: Jurist- og Økonomforbundets Forlag, 2021), p. 129. ^ Back to section

**15** See Section 126 of the Administration of Justice Act. ^ Back to section

**16** See Section 61 of the articles of association of The Danish Bar and Law Society, which implements Section 127 of the Administration of Justice Act, and is approved by Ministerial Order No. 150 of 24 February 2020. ^ Back to section

**17** Consolidated Act No. 9 of 4 January 2023. ^ Back to section

**18** See Section 20(1) of the Act on Complaints and Claims in Healthcare. ^ Back to section

**19** See Section 20(1)(1) of the Act on Complaints and Claims in Healthcare. ^ Back to section

**20** One for the disciplinary board and one for the complaints boards; see Sections 12 and 12a of the Act on Complaints and Claims in Healthcare respectively. ^ Back to section

**21** Subject to further qualifying factors; see Section 8 of Ministerial Order No. 488 of 3 May 2018. ^ Back to section

**22** See Sections 30 and 31 of the Act on Complaints and Claims in Healthcare, and Kristina Sprove Askjær, Peter Jakobsen and Niels Hjortnæs,*Erstatning inden for sundhedsvæsnet*, 2nd ed. (Copenhagen: Karnov, 2017), p. 383. ^ Back to section

**23** Consolidated Act No. 406 of 29 March 2022. ^ Back to section

**24** See Sections 1 and 5 of the Financial Business Act. Note that the regulation of investment services companies has been separated out into the Investment Firms Act (Act No. 1155 of 8 June 2021). ^ Back to section

**25** For example, see Ministerial Order No. 944 of 21 June 2022 on good business practice in real estate credit lending. ^ Back to section

**26** See Section 3(2) of Ministerial Order No. 653 of 30 May 2018. ^ Back to section

**27** Consolidated Act No. 955 of 17 June 2022. ^ Back to section

**28** For example, see Section 279a of the Criminal Code, Consolidated Act No. 1360 of 28 September 2022. ^ Back to section

**29** Consolidated Act No. 510 of 24 February 2021, Sections 1 and 2. ^ Back to section

**30** See Chapter 7 of the Act on Sale of Real Property for reference to the disciplinary board. The complaints board is a private one, approved by the Ministry of Business and Industry. ^ Back to section

**31** See Section 4(1) of Ministerial Order No. 1537 of 9 December 2015. ^ Back to section

**32** See Section 6(2) of Ministerial Order No. 1537 of 9 December 2015. ^ Back to section

**33** Act No. 1532 of 21 December 2010 with later amendments and Ministerial Order No. 1587 of 10 November 2020. ^ Back to section

**34** Consolidated Act No. 1123 of 22 September 2015 with later amendments. ^ Back to section

**35** See Section 2(1) Ministerial Order No. 20 of 12 January 2011 with later amendments. ^ Back to section

**36** See Section 4(1)(5) of Ministerial Order No. 1587 of 10 November 2020. ^ Back to section

**37** See Torsten Iversen,*Entrepriseretten* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2016), p. 50. ^ Back to section

**38** AB 18 is intended to replace the earlier AB 92, which may still be agreed between parties. ^ Back to section

**39** ABT 18 is intended to replace the earlier ABT 93, which may still be agreed between parties. For reference, ABR 18 also replaced the earlier ABR 89, which concerns consultancy services for building and construction works. ^ Back to section

**40** See Clause 11(3) of both AB 18 and ABT 18. 'Usual' suggests the market standard. ^ Back to section

**41** See Torsten Iversen,*Entrepriseretten* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2016), p. 278. ^ Back to section

**42** See the respective articles of association of the boards, namely Ankenævnet for Tekniske Installationer, Byggeriets Ankenævn and Håndværkets Ankenævn, including as regards any minimum value of claims accepted. ^ Back to section

**43** For the purposes of this section, auditors fall under the description for accountants. ^ Back to section

**44** Consolidated Act No. 1451 of 9 November 2022 with later amendments. ^ Back to section

**45** Consolidated Act No. 1219 of 31 August 2022 with later amendments. ^ Back to section

**46** See Ministerial Order No. 952 of 24 June 2020 with later amendments, pursuant to Section 47 of the Act on Approved Auditors and Audit Firms. ^ Back to section

**47** See Sections 3(1)(7) and 3(4) of the Act on Approved Auditors and Audit Firms and Section 8(2)–(3) of Ministerial Order No. 1536 of 9 December 2015. ^ Back to section

**48** See Section II.iii of this chapter. ^ Back to section

**49** Consolidated Act No. 337 of 11 March 2022 with later amendments. ^ Back to section

**50** See Ministerial Order No. 1779 of 6 September 2021. ^ Back to section

**51** The insurance rules are set out separately and in more detail at Section 3(1) of Ministerial Order No. 696 of 26 May 2020. ^ Back to section

**52** Supreme Court, 1 December 2022, Case 241/2017. ^ Back to section

**53** Supreme Court, 15 January 2019, Case 226/2015 and Supreme Court, 22 June 2020, Case 209/2018. ^ Back to section

**54** Supreme Court, 2 June 2022, Case 32/2020. ^ Back to section

**55** UfR 2019.1907 H (Capinordic Bank A/S), UfR 2020.3547 H (Eik Bank Danmark A/S) and UfR 2022.3163 H (EBH Bank A/S). ^ Back to section

**56** Eastern High Court, 24 May 2022, Case BS-17708/2021-OLR. ^ Back to section


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# Hong Kong

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RPC

## Summary

**INTRODUCTION**

**SPECIFIC PROFESSIONS**

**YEAR IN REVIEW**

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# Introduction

## i Legal framework

The starting point for most professional negligence claims is to identify the contractual duties owed to the claimant (the plaintiff). The terms are usually found in the retainer, which is generally used by professionals to define the scope of their work, specify the fees and any commissions, and set out any limitations on liability. There are also terms implied by statute, such as the obligation of professionals to provide services to a client with reasonable care and skill.[2]

If there is a contractual relationship, it is likely that the professional also owes a concurrent duty of care to exercise reasonable skill and care to avoid tortious conduct. The principles under the tort of negligence play a key role in professional negligence claims.

In tort, the scope of a professional's duty is usually determined by the terms of the retainer, the purpose of the duty[3] and sometimes the relevant professional standards. In general, courts find the existence of a duty of care where there has been a clear assumption of responsibility to the claimant by the professional. It is a duty to exercise reasonable skill and care that does not require perfection or a particular guaranteed result.

This principle applies to professional-client retainers, as well as non-client relationships. In the absence of a retainer, a third party can claim against a professional by establishing that the professional owed them a duty of care. In some cases, courts are required to consider the circumstances in which a professional may have assumed a duty of care to a third party.

In certain circumstances, a professional may also owe fiduciary duties to a client. These are obligations based upon the trust reposed in professional advisers by their clients. This includes the duty of loyalty, duty to act in good faith in the best interests of the client and duty to avoid conflicts of interests with the client.

Once the existence of a duty of care has been established, the claimant must then prove that there has been a breach of duty. In most professional negligence claims, the *Bolam*[4] test applies – a professional's standard of skill and care is determined by reference to the members of the profession concerned. In more recent times, regulation and professional standards have been of increasing significance, and can provide helpful guidance as to the standard required to discharge a duty of care.

There are no degrees of negligence, such as between negligence and gross negligence. A professional is adjudged either to have taken reasonable care or not to have done so. If a professional has breached its duty of care, the claimant must also prove that this caused the claimant to sustain loss. This requires the claimant to prove that he or she would not have suffered loss if it were not for the professional's acts or omissions.

Overall, the burden is on the claimant to prove that the claim will be successful on the balance of probability. This means that the claimant must prove that it was more likely than not that the professional's breach of duty caused the damage suffered by the claimant. In percentage terms, the court must conclude that it is at least 51 per cent likely that the claimant's case is proved. This is the standard of proof that applies in all civil cases.

Courts have in certain circumstances diverged from the traditional balance of probability test, with the main difficulty being that it has an all-or-nothing outcome – if the probabilities are equal (i.e., at 50 per cent), the claim will fail. In 'loss of chance' cases, however, where a claimant has lost the opportunity to pursue a course of action, the courts have applied a two-stage test to determine liability.[5]

In such cases, claimants first need to prove on the balance of probability that they had a real or substantial chance that the third party would have acted to confer the benefit in question. If the court decides that this chance is established, the court will evaluate that chance in percentage terms, which will be used to calculate the damages owed.

### ii Limitation and prescription

The time limit for commencing civil claims against professionals is usually six years from the date on which the cause of action accrues.[6]

For contract, the six-year limitation period commences from the date on which the act or omission alleged to amount to a breach of the contractual duty occurred,[7] even though damage may be suffered later.

For tort, an action must be instituted within six years of the date on which damage is suffered, which is not necessarily when the defendant breached the duty of care. A cause of action in tort accrues when the damage that results from the tortious conduct is real, as distinct from minimal or negligible, and is actual, as opposed to purely contingent. It includes damage consisting of any detriment, liability or loss capable of assessment in money terms. Where economic loss is involved, it includes loss suffered by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability.[8]

Where the damage is latent, the limitation period is either six years from the date on which the cause of action accrues or three years from the date of acquiring the knowledge required for bringing an action in respect of the relevant damage, whichever is later.[9]

Where an action is based upon the fraud of the defendant, and any fact relevant to the claimant's right of action has been deliberately concealed from the claimant by the defendant, or an action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the claimant discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.[10]

It is common for a claimant to issue a writ of summons within the prescribed time limit; the claimant may serve the writ within 12 months (inclusive of the day of issue) of the date of its issuance. Such a writ is commonly referred to as a 'protective writ'. Where a writ has not been served on a defendant, the courts may, by order, extend the validity of the writ from time to time for a set period, not exceeding 12 months at any one time. The court will usually exercise its discretion to grant an extension where the claimant can demonstrate that there are good reasons to do so, such as the claimant's need for more time to conduct investigations to determine causes of action they may have against the defendant.

More generally, courts have acknowledged that negligence claims against professionals – putting their credibility and reputation at stake – should be made as promptly as possible. It is unsatisfactory for professionals to have proceedings of this kind hanging over them for an

extended period.[11] Also, courts have reminded claimants that allegations of fraud should only be made if they can be backed up by credible material, and courts will scrutinise pleas of this kind with care.[12] Otherwise, courts are willing to strike out defective claims at an early stage.

### iii Dispute fora and resolution

Since 1 July 1997, Hong Kong has been a Special Administrative Region of the People's Republic of China (PRC) – also known as the Hong Kong Special Administrative Region (HKSAR). Hong Kong is an inalienable part of China[13] but a separate jurisdiction – under what is known as the 'One Country, Two Systems' principle. Hong Kong is the only common law jurisdiction in China. The Basic Law of the HKSAR of the PRC (the Basic Law) provides that the capitalist system in force in Hong Kong before 1997 shall remain unchanged for 50 years and that Hong Kong shall enjoy a high degree of autonomy.[14] The year 2023 marks the beginning of the second half of the 50-year period and the Chinese government and the Hong Kong government have publicly stated that the intention is that One Country, Two Systems should continue beyond 2047.

Articles 8 and 18 of the Basic Law provide that (among other things) the laws previously in force in Hong Kong – namely, the common law, rules of equity, ordinances, subordinate legislation and customary law – shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of Hong Kong. Chinese and English are official languages in Hong Kong.[15] The national laws of China do not apply in Hong Kong, except for those listed in Annex III to the Basic Law that relate to defence and foreign affairs, as well as other matters outside the limits of the autonomy of Hong Kong as specified by the Basic Law.[16]

The courts of Hong Kong are vested with independent power and have jurisdiction over all cases in Hong Kong, except that they have no jurisdiction over acts of state such as defence and foreign affairs.[17] *Lai v. The Committee for Safeguarding National Security of the HKSAR & Ors*[18] confirms that, under the constitutional set-up in Hong Kong, the courts have no supervisory jurisdiction over the work undertaken by the Committee for Safeguarding National Security of the HKSAR pursuant to Article 14 of the Law of the PRC on Safeguarding National Security in the HKSAR (known as the National Security Law).

Judges and other members of the judiciary of Hong Kong are chosen based on their professional qualities and may be recruited from other common law jurisdictions.[19]

Hong Kong's apex court is the Court of Final Appeal (CFA), which has its own Hong Kong Court of Final Appeal Ordinance (HKCFAO)[20] and rules.[21] No appeals to the CFA shall be admitted unless leave (permission) has been granted by the Court of Appeal (CA). If the CA refuses to grant leave, an application for leave can be made to the CFA, which will be heard and determined by the Appeal Committee of the CFA, which is made up of three CFA judges – the Chief Justice of the CFA and two permanent judges of the CFA or the three permanent judges. The decision of the Appeal Committee is final and not subject to appeal.

The CFA usually comprises five judges – the Chief Justice, the three permanent judges and one non-permanent judge. There are two panels of non-permanent judges of the CFA – one consisting of former Hong Kong judges and the other consisting of eminent judges from other common law jurisdictions. The total number of non-permanent judges of the CFA

is capped at 30, pursuant to the HKCFAO. At the time of writing, there are approximately 15 non-permanent judges.

As the CFA is Hong Kong's highest court, its decisions and judgments are binding on the CA, the Court of First Instance (CFI) and the District Court. The Hong Kong courts may refer to precedents of other common law jurisdictions.[22] The Hong Kong courts have repeatedly confirmed the importance of deriving assistance from overseas common law jurisprudence. However, after 1 July 1997, although decisions and judgments of the United Kingdom Supreme Court (previously the House of Lords) and the Privy Council are treated with great respect, their persuasive effect depends on all relevant circumstances, including the nature of the issue and the similarity of any statutory or constitutional provision.[23] In matters of professional negligence, the Hong Kong courts are reliant on appeal cases from England and Wales, which once applied become part of local precedent.

Claims against professionals are usually brought in the CFI. The procedures are provided for in the High Court Ordinance (HCO)[24] and the Rules of the High Court (RHC),[25-] together with the related practice directions for the conduct of court proceedings. The District Court has a monetary jurisdiction for general civil claims of up to HK$7 million and professional negligence claims can be commenced in the District Court. The District Court has its own rules (RDC) and practice directions.[26] There are no specialist courts in the High Court or the District Court, and each court has its own civil and criminal jurisdiction; however, there are specialist lists (with their own practice directions) in which cases are assigned to certain judges according to their experience and appointment; for example, personal injuries claims, commercial cases and administrative law matters.

The courts support alternative dispute resolution (ADR), a common mode of which is mediation.[27] While mediation is not mandatory under the RHC or RDC, the courts may stay any part of the proceedings for mediation. In exercising their discretion on deciding costs, the courts may consider all relevant circumstances, including any unreasonable failure of a party to engage in mediation where this can be established by admissible materials.[28]

Arbitration is another mode of ADR, where the parties' agreement refers disputes to arbitration. The Arbitration Ordinance (AO)[29] governs arbitration in Hong Kong and provides for the conduct of arbitration.[30]

Under the Supplementary Legal Aid Scheme, legal aid (which is subject to both a means and a merits test) is available for negligence claims against certain professionals, such as practising certified public accountants and registered professional surveyors, where the claim is likely to exceed HK$75,000.

### iv Remedies and loss

As mentioned above (Section I.i ), professionals may be sued both in contract (i.e., under the retainer) and in tort for negligence. Damages are awarded to compensate the claimant for the loss that they have suffered because of the defendant's conduct, to put the claimant in the position (in monetary terms) they would have been in had the contract not been breached or the tort not committed.

Pre-judgment interest and post-judgment interest may be awarded pursuant to Sections 48 and 49 of the HCO and Sections 49 and 50 of the DCO. The rates are decided by the courts

– pre-judgment interest is commonly 1 per cent above the prime rate; and post-judgment interest is usually at the judgment rate ordered by the Chief Justice.[31]

Other remedies, such as injunctions, declarations and accounts of profits, may be granted in cases where appropriate.

The defence of contributory negligence may be available to reduce or extinguish the amount of the claim in cases where the claimant's own negligence contributed to the loss.-[32] There are no rules limiting the damages that the courts may award, but a claimant must reasonably mitigate its loss.

## Specific professions

### i Lawyers

Solicitors are regulated by the Legal Practitioners Ordinance (LPO)[33] and its subsidiary legislation. The Law Society of Hong Kong (LSHK) is the self-regulatory body and professional association for solicitors, with 13,144 members.[34] The LSHK also regulates approximately 98 solicitor advocates (who have higher rights of audience and can make submissions before the High Court and the CFA) and approximately 1,450 registered foreign lawyers (who work for either registered foreign law firms or solicitor firms in Hong Kong).

The Hong Kong Solicitors' Guide to Professional Conduct issued by the LSHK sets out the basic principles governing the practice of solicitors, complaints about which can be made to the LSHK. The Solicitors Disciplinary Tribunal (SDT)[35] deals with disciplinary cases that the LSHK brings for alleged professional misconduct. It has a wide range of disciplinary powers, including striking off the name of a solicitor, suspending a solicitor and imposing a fine not exceeding HK$500,000.

Indemnity insurance is mandatory for solicitors. The Solicitors Professional Indemnity Scheme, governed by the Solicitors (Professional Indemnity) Rules,[36] is held, managed and administered by Hong Kong Solicitors Indemnity Fund Limited. The limit of indemnity is HK$20 million for claims first notified and first made on or after 1 October 2019. Solicitors' firms can take additional insurance to cover liability over HK$20 million. Registered foreign law firms must have their own equivalent insurance cover.

Barristers are also regulated by the LPO and its subsidiary legislation. The Hong Kong Bar Association (HKBA) is the professional organisation of barristers in Hong Kong, governed by an executive committee known as the Bar Council. There are approximately 100 senior counsel and 1,500 junior barristers.[37]

Barristers must comply with the Code of Conduct issued by the HKBA. A complaint alleging breach can be made to the HKBA. The Bar Council may then refer the matter to the Barristers Disciplinary Tribunal, which is an independent body comprising members appointed by the Chief Justice that has power to impose different forms of punishment similar to those available to the SDT.

All barristers, including pupils in limited practice, must be insured under the master policy for professional indemnity insurance. The current mandatory limit of indemnity is HK$10 million. Barristers can top up their insurance to cover liability over HK$10 million.

Both solicitors and barristers can be subject to wasted costs orders, which may be imposed by courts against lawyers where legal costs have been incurred as a result of their improper, unreasonable or negligent conduct.[38] Wasted costs orders are usually personally borne by the lawyers.

In a claim in negligence, a defendant is only liable for damages in respect of losses of a kind that fall within the scope of his or her duty of care, which is governed by the purpose of the duty and judged on an objective basis by reference to the reason why the advice is given.[39]

In *Dymocks Franchise Systems (China) Ltd v. Norton Rose Fulbright HK*,[40] the solicitors' firm failed to alert the client to critical legislation that imposed liability for past debts on the client when it took over a struggling bookshop. Damages of approximately HK$4.4 million were awarded.

In *William Allan v. Messrs Ng & Co (A Firm) & Anor*,[41] a partner at the defendant firm divulged confidential information imparted to him by the plaintiff's sister on the plaintiff's behalf with a view to instructing the defendant firm to act for the plaintiff in matrimonial proceedings against the plaintiff's wife. The defendant firm later acted for the wife in the matrimonial proceedings and was vicariously liable for the breach of the duty of confidence by the partner. The SDT separately ordered the partner's name to be struck off and imposed fines of HK$125,000.

In *Lee Po Chu Feona v. Joyce Chan & Co (a firm)*,[42] the plaintiff claimed against the defendant firm for forfeited deposits of HK$10.5 million under a provisional sale and purchase agreement in respect of a property transaction, alleging that the defendant firm failed to advise her to terminate the agreement on the basis of the vendor's breach of the agreement. The CFI found that the firm provided advice that a reasonably competent solicitor would have given in accordance with the state of the relevant law in 2015.

### ii Medical practitioners

There are on average two doctors per 1,000 people in Hong Kong, and these doctors are regulated by the Medical Registration Ordinance.[43] The Medical Council of Hong Kong (MCHK) is the relevant regulatory body and has issued the Professional Code and Conduct for the Guidance of Registered Medical Practitioners.

Complaints against doctors are made to the MCHK, which is empowered to investigate professional misconduct, whether complaints are from the public or a public authority.

Any contravention of the Professional Code and Conduct for the Guidance of Registered Medical Practitioners may render a registered medical practitioner liable to disciplinary proceedings and consequences, such as a public warning or reprimand, suspension of registration and striking-off.

The Hospital Authority (the statutory body established under the Hospital Authority Ordinance[44] to manage Hong Kong's public hospital services) has taken out a Disciplinary Protection Insurance policy, with effect from 1 December 2018, to cover its eligible clinical

and non-clinical professionals, including ex-staff and honorary staff who have worked or work in the Hospital Authority at any time on or after 1 December 1991. It aims to support its staff in any disciplinary inquiry commenced in Hong Kong and conducted by professional bodies.

Medical practitioners owe a duty of care to their patients. They may be sued for negligence arising from a breach of a duty of care, for which hospitals may also be held vicariously liable. The test in a claim of medical negligence is the *Bolam* test.[45]

As to the duty to advise, *Montgomery v. Lanarkshire Health Board*[46] held that an adult person of sound mind is entitled to decide which, if any, of the available forms of medical treatment to undergo, and their consent has to be obtained before treatment interfering with their bodily integrity is undertaken; therefore, a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and aware of any reasonable alternative or variant treatments.

*Wan Sai Ping (Widow of Lo Chung Hing, deceased) & Anor v. Hong Kong Baptist Hospital*,[47] in respect of the outbreak of the severe acute respiratory syndrome in Hong Kong in 2003, held that a plaintiff must plead all the circumstantial facts to support its case on causation and the possible route of transmission that it seeks to establish, such as the nexus between the type of isolation system and contraction of the virus.

If a medical practitioner is found liable in negligence, compensation is awarded to place the plaintiff in the position it would have been in had the medical negligence not occurred. In determining the amount of the award, factors for consideration include the plaintiff's age, previous and current medical condition, length of time to be spent in hospital, the kind and number of treatments received, and any psychological problems.

### iii Banking and finance professionals

The Hong Kong Monetary Authority (HKMA) is the central banking institution in Hong Kong and has issued a Code of Conduct for its staff.

Staff who fail to comply with the principles in the Code of Conduct and who by their actions bring the HKMA into disrepute are liable to disciplinary action, including dismissal. Internal investigations may be conducted into allegations of misconduct referred by the Independent Commission Against Corruption, the police and other law enforcement bodies, with a view to deciding whether follow-up disciplinary or management actions are warranted.

All banks must be members of the Hong Kong Association of Banks (HKAB) and subject to the HKAB's rules. The HKAB and the Deposit Taking Companies Association have also jointly issued the Code of Banking Practice, which authorised institutions must comply with when dealing with and providing services to customers.

Based upon the recommendation of the Disciplinary Committee of the HKAB, the Committee (which is the highest executive body) of the HKMA has power to impose penalties on a member in breach of any rules of the HKAB, ranging from reprimand to expulsion of membership.

The Securities and Futures Commission (SFC) is an independent statutory body, empowered by the Securities and Futures Ordinance (SFO)[48] to regulate Hong Kong's

securities and futures markets.[49] The SFC is guided by the Code of Conduct for Persons Licensed by or Registered with the SFC in considering whether a licensed person satisfies the requirement that they are fit and proper to remain licensed or registered.

The SFC may conduct investigations into offences under the SFO, such as fraud, market misconduct, breaches of disclosure requirements, and insider dealing. The SFC has the power to require, by notice, a person under investigation to produce relevant documents and attend interviews to answer questions.[50] Other enforcement actions of the SFC include imposing prohibition orders, suspending licences, imposing fines and issuing public or private reprimands.

*PT Asuransi Tugu Pratama Indonesia TBK v. Citibank NA*[51] confirms that a banker's duty is to make payments only with the authority of the customer (i.e., in accordance with the customer's mandate). A bank may, however, be able to rely on an agent's apparent (or ostensible) authority by virtue of his or her position as a signatory or officer of the company, which will bind the company as regards a third party who has no notice of the want of actual authority. Further, in transferring funds to another party, a banker acts as the customer's agent and owes all the ordinary duties of an agent, including the duty to exercise reasonable skill and care, both in contract and in tort. Also, the court considered that contributory negligence may be available as a partial defence in respect of a claim for damages for breach of a bank's duty of care in making payments to third parties.[52]

### iv Computer and information technology professionals

Computer and information technology professionals are not regulated except where data is involved, in which case the Personal Data (Privacy) Ordinance (PDPO)[53] is the applicable data protection and privacy law.

The Office of the Privacy Commissioner for Personal Data (PCPD) was established under the PDPO as the dedicated and independent data privacy regulator, overseeing the implementation of and compliance with the provisions of the PDPO.

The PDPO applies to both the private and the public sectors. The Data Protection Principles (DPPs), which are contained in Schedule 1 to the PDPO, outline how data users should collect, handle and use personal data, complemented by other provisions imposing further compliance requirements.[54]

Pursuant to the Personal Data (Privacy) Amendment Ordinance 2021 (PDPAO), which took effect on 8 October 2021, it is an offence to disclose any personal data of a data subject without the relevant consent of the data subject and where the discloser has an intent to or is being reckless as to whether any specified harm would be likely to be caused to the data subject or any family member of the data subject. By the PDPAO, the PCPD is empowered with additional powers to: (1) carry out criminal investigation into offences for disclosing personal data without consent; (2) institute prosecution in its own name for summary offences in the magistrates' courts; (3) request the provisions of relevant documents and answers to facilitate an investigation into doxing and its related offences; (4) apply for a warrant to enter and search premises, seize, remove and detain any material for the purpose of a specified investigation; (5) apply for a warrant to access, seize and detain an electronic device and decrypt material stored therein; and (6) serve a cessation notice, with extraterritorial effect, to remove doxing contents.

Complaints about possible contravention of the PDPO by a particular data user in relation to the handling of personal data may be lodged with the PCPD, which may carry out an investigation and publish a report setting out the investigation results and recommendations. The PCPD may also issue an enforcement notice to the data user directing remedial or preventive steps to be taken. The contravention of an enforcement notice is an offence that may result in a maximum fine of HK$50,000 and imprisonment for two years, with a daily penalty of HK$1,000. Subsequent convictions can result in a maximum fine of HK$100,000 and imprisonment for two years, with a daily penalty of HK$2,000.

Data subjects may seek compensation by civil action from data users for damage caused by a contravention of the PDPO. For example, in *Tsang Po Mann v. Tsang Ka Kit & Anor*,[55] the defendants sent the plaintiff's workplace a letter containing four video captures from the defendant's CCTV cameras. The plaintiff claimed under Section 66 of the PDPO based on the defendants' contravention of DPPs 3 and 4, and was awarded compensation of HK$70,000 because of the gravity of the injury to her feelings and the manner in which the photos were misused.

### v Real property surveyors

Real property surveyors are regulated by the Hong Kong Institute of Surveyors (HKIS), which was statutorily incorporated by virtue of the Hong Kong Institute of Surveyors Ordinance[56] and has 11,051 members.[57]

The HKIS has issued the Rules of Conduct, complaints of any breach of which may be investigated and result in reprimand, striking-off or suspension of membership. Disciplinary orders may also be published in newspapers.

In *So Kai Hau v. YSK2 Engineering Company Limited*,[58] the CA upheld the CFI's judgment that a building surveyor's duties extend beyond the period of appointment. In determining the duty to take reasonable care to protect demolition workers from obvious danger after the surveyor's work ceases, foreseeability of harm and a relation of sufficient proximity between the plaintiff and the defendant are required. The greater the potential for harm, the more likely it is that it will be fair, just and reasonable to impose a duty of care, taking into consideration all relevant circumstances and weighing up and balancing competing factual and legal factors.

### vi Construction professionals

At common law, employers have a duty to take reasonable care for their employees' safety. A breach of this duty resulting in injury to or death of an employee may give rise to a cause of action against the employer in negligence. Employers are not exempted from this duty by the fact that their employees are experienced and might be able to lay down a reasonably safe system of work themselves.

More particularly, the Factories and Industrial Undertakings Ordinance (FIUO)[59] imposes a statutory duty on every proprietor of an industrial undertaking to ensure, so far as is reasonably practicable, the health and safety at work of all persons employed by him or her at the industrial undertaking. That duty extends to (1) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and

without risks to health, and (2) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of all persons employed by him or her at the industrial undertaking.

In this regard, the CA in *HKSAR v. Gammon Construction Limited*[60] upheld the conviction against the defendant in failing to (1) provide and maintain a safe system of work, (2) provide necessary instruction and supervision for the health and safety at work of persons employed at an industrial undertaking, and (3) develop, implement and maintain a safety management system, under the FIUO and its subsidiary regulation.

### vii Accountants and auditors

The main statutory bodies regulating accountants and auditors are the Accounting and Financial Reporting Council (AFRC) (formerly known as the Financial Reporting Council) and the Hong Kong Institute of Certified Public Accountants (HKICPA).

As of 1 October 2022, the AFRC became a fully fledged independent regulator and oversight body for the accounting profession in Hong Kong, when major regulatory powers were transferred from the HKICPA, including the power to regulate both public interest entity (PIE) auditors and certified public accountants (CPA). Its main functions now include the issuance of practice certificates and registration of PIE auditors and CPA firms, as well as responsibility for inspection, investigation and disciplinary matters in the accounting profession.

The AFRC also now oversees the HKICPA's performance of its various statutory functions. The HKICPA remains responsible for registering CPAs, training and development of the accounting profession, and issuing or specifying standards on professional ethics, accounting, and auditing and assurance for CPAs.

A significant number of listed entities in Hong Kong predominantly have operations in mainland China. To assist the conduct of its inspections and investigations, the AFRC can access audit working papers held by accounting firms in mainland China, pursuant to a memorandum of understanding signed between the FRC and the Supervision and Evaluation Bureau of the Ministry of Finance of the People's Republic of China (SEB) on 22 May 2019. The AFRC also regularly engages in dialogue with the SEB to facilitate greater cross-border cooperation and collaboration in relation to audit regulation.

All corporate practices (as opposed to partnerships) are required to have professional indemnity insurance on terms approved by the HKICPA and must ensure that the insurance complies with the minimum requirements set out in the rules. This is designed to protect accountants and auditors from claims arising from negligent acts, errors and omissions, which may occur in the course of providing auditing, accounting, taxation, advisory, valuation, regulatory and consultancy work.

### viii Insurance professionals

Insurance intermediaries have been regulated by the Insurance Authority (IA) since 23 September 2019, when it assumed responsibility for the supervision and regulation of all insurance entities in Hong Kong. The IA replaced the self-regulatory regime of the Insurance Agents Registration Board, established by the Hong Kong Federation

of Insurers, the Hong Kong Confederation of Insurance Brokers and the Professional Insurance Brokers Association.

The IA is now responsible for supervising insurance intermediaries' compliance with the Insurance Ordinance (IO),[61] and the relevant regulations, rules, codes and guidelines issued by the IA. The IA is also responsible for promoting and encouraging the adoption of proper standards of conduct and has wider regulatory powers in relation to licensing, inspection, investigation and disciplinary sanctions. Under this regime, the IA has power to take a number of disciplinary actions against regulated persons under the IO, including imposing pecuniary penalties of up to HK$10 million or three times the amount of profit gained or loss avoided by the person as a result of the misconduct.

There are two main categories of insurance intermediaries. First, licensed insurance agents act for insurance companies in arranging and accepting insurance policies on behalf of the insurer. Second, licensed insurance brokers act as agents of clients and provide advice on insurance policies, including negotiation and arrangement of policies with insurers and handling claims on behalf of insureds.

All insurance intermediaries carrying out regulated activities under the IO need to hold the appropriate type of insurance intermediary licence, unless an exemption applies such as in relation to employees of certain insurance intermediaries, including claims handlers or staff discharging clerical or administrative duties.

All licensed insurance brokers must maintain a professional indemnity insurance policy and must ensure that the insurance complies with the minimum requirements set out in the IO. In contrast, licensed insurance agents do not need to maintain professional indemnity insurance.

### ix Insolvency practitioners

There are no specific licensing or registration requirements for insolvency practitioners (IPs) in Hong Kong. In practice, however, most IPs tend to be accountants or similar professionals.

There are various types of IPs in Hong Kong, including liquidators, provisional liquidators, receivers, trustees in bankruptcy, administrators and managers. In general, IPs are usually appointed by the court, or pursuant to some loan or other agreement, and do not enter into traditional engagement letters. This means that the scope of duty for each type of IP depends on the circumstances in which they came to be appointed, the terms of the court order or other document pursuant to which they were appointed and the relevant statutory provisions, regulations and codes.

For example, a liquidator is responsible for investigating the company's affairs, realising the assets of the company and distributing the proceeds to the creditors in accordance with the Companies (Winding Up and Miscellaneous Provisions) Ordinance[62] and the Companies (Winding-Up) Rules.[63] In certain circumstances, a liquidator may commence legal action in the name and on behalf of the company, including against former directors and officers or professional advisers engaged prior to the company's collapse. A liquidator also owes fiduciary duties towards the company and the creditors, and is expected to act honestly, with due care and diligence, and in good faith, in dealing with the company's

assets. In certain cases, such as compulsory winding-up proceedings, a liquidator is an officer of the court and must act impartially, to the same standards as a judge.

Hong Kong has not adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, which provides mechanisms for dealing with cases of cross-border insolvency. There are also no specific statutory provisions empowering the Hong Kong courts to render assistance to a foreign court in insolvency proceedings. Instead, the Hong Kong courts have developed a common law framework to address issues of this kind. The Hong Kong courts have recognised foreign liquidators and provided assistance at their discretion.

On 14 May 2021, the Hong Kong and mainland China authorities signed the Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region, which sets out the much anticipated cross-border mutual recognition of and assistance to insolvency proceedings between Hong Kong and mainland China. This the first time that either Hong Kong or mainland China has entered into a cooperation framework with any other jurisdiction in respect of insolvency matters. Under this new cooperation framework, Hong Kong liquidators can now apply to specified mainland China courts for recognition and vice versa. At present, this arrangement is currently limited to the courts of Shanghai, Xiamen and Shenzhen, although it is anticipated that other mainland courts will be added to this arrangement.

IPs, unlike other professionals such as lawyers or accountants, cannot limit the scope of their duty and services as they are prescribed by law. As a result, IPs are vulnerable to criticism and subject to a variety of professional negligence claims. Most claims are made under the tort of negligence or misfeasance, although there has been a rise in claims based on economic torts, such as unlawful means conspiracy.

## Year in review

As mentioned above, professionals who enter into a retainer with their clients usually owe concurrent duties in both contract and tort. If a professional is sued by its client, the question of whether the client was contributorily negligent will often arise.[64] As with most common law jurisdictions, this defence is not available for contractual claims and it is only a partial defence and does not operate as a complete bar to a claim. The question whether contributory negligence is available for defendants concurrently liable in both contract and tort is less clear. In the recent case of *Tugu*, the CFA had an opportunity to clarify Hong Kong's position on this issue.[65]

In *Tugu*, the plaintiff opened an account with the respondent bank. Over a period of four years, 26 payments amounting to US$51.64 million were made and each transfer was authorised by officers of the plaintiff. The plaintiff claimed in debt against the bank in respect of the payments or, alternatively, for damages for a breach of a duty of care owed in contract or tort. The CFI held that the transfers were fraudulent and the bank breached its duty of care, on the basis that it did not make proper inquiries as from the third payment. However, the CFI dismissed the plaintiff's claim on the basis that it had been commenced out of time under the Limitation Ordinance,[66] and this decision was upheld by the CA. Interestingly,

both the CA and the CFI held that if it were not for limitation, the plaintiff would have been 50 per cent contributorily negligent.

In the leading judgment delivered by Lord Sumption (a former United Kingdom Supreme Court Justice who was sitting as a non-permanent judge), the CFA overturned the decision and allowed the plaintiff's claim. On the issue of contributory negligence, the CFA held that Section 21 of the Law Amendment and Reform (Consolidation) Ordinance did not apply as the plaintiff had succeeded in a claim in debt, to which contributory negligence was not a defence.

The CFA judgment also applies the English case of *Vesta v. Butcher*,[67] which confirms that (as regards concurrent duties) a party can make a claim for contributory negligence only where the defendant's liability in contract is the same as their liability in the tort of negligence independently of the existence of any contract.

Prior to *Tugu*, the position in Hong Kong had been less clear. In *International Trading Co Ltd v. Lai Kam Man & Others*,[68] the CFI followed the Australian case of *Astley v. Austrust Ltd*,[69] which held that contributory negligence was not available for breaches of concurrent duties in tort and contract. This stood in contrast to *Vesta v. Butcher* (referred to in *Tugu*). Pursuant to *Vesta v. Butcher*, professionals can avail themselves of the defence of contributory negligence to reduce their exposure to negligence claims.

Under the common law of champerty and maintenance, commercial funding of litigation is generally prohibited, although plaintiffs often rely on insolvency as a recognised exemption to fund high-value claims against professionals. As mentioned above, most professionals have professional indemnity insurance, which may make them a litigation target. If plaintiffs successfully settle the matter or obtain judgment in their favour, this can bolster the assets of the insolvent estate.

In addition, following the latest amendments to the AO and the introduction of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules,[70] commercial funding and outcome-related fee structures are now available for arbitration in Hong Kong.

During the covid-19 pandemic, there was an increase in the backlog of civil cases. The resultant delay may have been helpful to some defendants or respondents. The courts have sought to alleviate some of the delays with more extensive use of technology and paper disposal of routine applications; in particular, with the use of remote hearings for some interlocutory matters.

In June 2022, the judiciary administration announced a three-month public consultation regarding a Courts (Remote Hearing) Bill. The draft Bill provides a legal framework for the use of remote hearings for all courts and various statutory tribunals in Hong Kong. Although there are no legal impediments to the use of remote hearings in civil proceedings, there are no express rules providing for their use. The consultation document proposed that the default mode for a hearing remain a physical hearing. A key provision in the Bill is that a court may (on its own motion or on an application by a party) make an order for a hearing to be conducted remotely. The court's decision is an exercise of case management discretion applying criteria set out in the Bill. Passage of the Bill is expected in 2023 and the legislation is likely to come into effect in 2024, once the relevant practice directions have been prepared.

The courts are generally making more use of use of technology, including an integrated Court Case Management System (iCMS) for electronic filing and payments related to civil proceedings in the District Court. The iCMS is expected to be extended to other levels of courts in phases from 2024. Lawyers and their staff will need to keep informed of developments.

## Outlook and future developments

After four years of challenging geopolitical and economic headwinds and the covid-19 pandemic, the Hong Kong economy has struggled and been in and out of recession. Although the economy is starting to reopen and international travel is beginning to return to pre-pandemic levels, the economic uncertainties are such that an increase in claims against professional advisers is expected.

In the coming year, it is expected that Hong Kong will continue economic integration with the Guangdong–Hong Kong–Macau Greater Bay Area (GBA).

The Agreement Concerning Amendment to the Closer Economic Partnership Agreement on Trade in Services was implemented by mainland China and Hong Kong on 1 June 2020, allowing a range of Hong Kong professionals to register and practice in the GBA. Upon passing the examinations and obtaining the relevant practice certificate, Hong Kong lawyers (including solicitors and barristers) may now provide legal services in nine Mainland municipalities in the GBA in specified civil and commercial matters (including litigation and non-litigation matters) to which mainland laws apply. Under this regime, Hong Kong lawyers can be retained by mainland China law firms and can become partners at mainland law firms. Overall, they will enjoy the same privileges as mainland lawyers, although they will also be under the same obligations as them.

Moreover, the highly anticipated Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance[71] was passed on 26 October 2022 and is set to take effect in mid-to-late 2023. This will supersede the existing reciprocal enforcement arrangement, the Mainland Judgments (Reciprocal Enforcement) Ordinance,[72] which was implemented on 1 August 2008.

Under this new regime, claimants will be able to enforce a wider range of civil and commercial judgments, which includes both contractual and non-contractual disputes. Only certain matters relating to insolvency, family, intellectual property and maritime law will be excluded. In mainland China, judgments, orders and decrees made by most Hong Kong courts and tribunals will be enforceable; in Hong Kong, judgments, rulings, conciliatory statements and orders of payments made by the basic people's courts in mainland China will be enforceable.

Overall, this new regime strengthens Hong Kong's unique position as a regional centre for commercial disputes relating to matters with a mainland China connection. The enforcement of judgments across the boundary will become more expedient and there will be less relitigation in mainland China and Hong Kong. It remains to be seen whether this will result in an increase in exposure for professionals, such as accountants and auditors who provide a full range of business services across mainland China and Hong Kong.

Endnotes

1 Antony Sassi is managing partner and Michelle Lai and Anson Lo are associates at Reynolds Porter Chamberlain. The authors would like to acknowledge the considerable assistance provided by senior consultants David Smyth and Warren Ganesh, and trainee solicitors Angel Leung and Abbie Cheung. ^ Back to section

2 See Section 5 of the Supply of Services (Implied Terms) Ordinance (Cap. 457). ^ Back to section

3 *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20; [2021] 3 W.L.R. 81. ^ Back to section

4 *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582. ^ Back to section

5 *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602. ^ Back to section

6 Limitation Ordinance (Cap. 347) (LO). ^ Back to section

7 Section 4(1)(a) of the LO. ^ Back to section

8 *Kensland Realty Ltd v. Tai, Tang & Chong* [2008] 11 HKCFAR 237. ^ Back to section

9 Section 31 of the LO. ^ Back to section

10 Section 26 of the LO. ^ Back to section

11 *Beijing Tong Gang Da Sheng Trade Co Ltd v. Allen & Overy and Anor* [2014] 3 HKLRD 292, at paragraph 36. ^ Back to section

12 *Chinachem Charitable Foundation Ltd v. Chan Wai Tong Christopher and Ors* [2021] HKCFI 1347, at paragraphs 22 to 23; *Hobbins v. Royal Skandia Life Assurance Ltd and Anor* [2012] 1 HKLRD 977, at paragraphs 140 to 142. See also paragraph 10.23 of the Hong Kong Bar Association Code of Conduct, which prevents barristers from pleading allegations of fraud unless they have reasonably credible material that establishes a prima facie case of fraud. ^ Back to section

13 Article 1 of the Basic Law of the HKSAR of the PRC (the Basic Law). ^ Back to section

14 Articles 5 and 12 of the Basic Law. ^ Back to section

15 Article 9 of the Basic Law. ^ Back to section

16 For example, the Law of the PRC on Safeguarding National Security in the HKSAR (as from 11pm on 30 June 2020). ^ Back to section

**17** Articles 19, 80 and 85 of the Basic Law. The Hong Kong courts must obtain a certificate from the Chief Executive of Hong Kong on questions of fact concerning acts of state such as defence and foreign affairs where such questions arise in the adjudication of cases. This certificate shall be binding on the courts. See also Article 158 of the Basic Law, regarding the limits of the autonomy of the Hong Kong Special Administrative Region. ^ Back to section

**18** [2023] HKCFI 1382. ^ Back to section

**19** Article 92 of the Basic Law. ^ Back to section

**20** Cap. 484. ^ Back to section

**21** Hong Kong Court of Final Appeal Rules (Cap. 484A). ^ Back to section

**22** Article 84 of the Basic Law. ^ Back to section

**23** *Solicitor (24/07) v. Law Society of Hong Kong* (2008) 11 HKCFAR 117; and *Monat Investment Ltd v. Lau & Ors* [2023] HKCA 479. ^ Back to section

**24** Cap. 4. ^ Back to section

**25** Cap. 4A. ^ Back to section

**26** District Court Ordinance (Cap. 336) (DCO); Rules of District Court (Cap. 336A); and Practice Direction 27 (Civil Proceedings in the District Court). The Family Court is part of the District Court and has its own practice directions and procedures. ^ Back to section

**27** One of the underlying objectives of the RHC/RDC is to facilitate the settlement of disputes. The courts have a duty, as part of active case management, to further that objective by encouraging and facilitating the parties to use an alternative dispute resolution procedure where appropriate. ^ Back to section

**28** Practice Direction 31 (Mediation), which applies to all civil proceedings in the CFI and District Court, except for those proceedings set out in Appendix A. ^ Back to section

**29** Cap. 609. ^ Back to section

**30** The AO is largely based upon the Model Law of the United Nations Commission on International Trade Law. ^ Back to section

**31** With effect from 1 July 2023 the rate of interest on judgment debts in the High Court and District Court is 8.662 per cent per annum. ^ Back to section

**32** Section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) (LARCO). See also*PT Asuransi Tugu Pratama Indonesia TBK v. Citibank NA* [2023] HKCFA 3, in Section III. ^ Back to section

**33** Cap. 159. ^ Back to section

**34** As of 31 December 2022. ^ Back to section

**35** Consisting of not more than 120 practising solicitors of at least 10 years' standing, not more than 10 foreign lawyers and not more than 60 lay members. ^ Back to section

**36** Cap. 159M. ^ Back to section

**37** As at January 2022. ^ Back to section

**38** Order 62 rule 8 of the RHC;*Ma So So Josephine v. Chin Yuk Lun Francis and Another* [2004] 3 HKLRD 294; and Practice Direction 14.5 (Application for Wasted Costs Order under Order 62, Rules 8, 8A, 8B and 8C). ^ Back to section

**39** *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20, [2022] A.C. 783, applied in *Chen Fenglan v. Kao, Lee & Yip, Solicitors (a firm)* [2022] HKCU 5619, [2022] HKDC 1317. ^ Back to section

**40** [2019] 3 HKLRD 742. ^ Back to section

**41** [2012] 2 HKLRD 160. ^ Back to section

**42** [2023] HKCFI 295. ^ Back to section

**43** Cap. 161. ^ Back to section

**44** Cap. 113. ^ Back to section

**45** See Section I.i. ^ Back to section

**46** [2015] UKSC 11. ^ Back to section

**47** DCPI 510/2006. ^ Back to section

**48** Cap. 571. ^ Back to section

**49** Including brokers, investment advisers and fund managers. ^ Back to section

**50** Such a written notice has commonly been referred to as a 'Section 183 notice'. ^ Back to section

**51** [2023] HKCFA 3. ^ Back to section

**52** [2023] HKCFA 3, at paragraph 31. See further comment on contributory negligence in Section III. ^ Back to section

**53** Cap. 486. ^ Back to section

**54** The website of the PCPD (at https://www.pcpd.org.hk/english/data_privacy_law/ordinance_at_a_Glance/ordinance.html) offers a summary of the DPPs as follows: DPP 1 provides that personal data shall only be collected for a lawful purpose directly related to a function or activity of the data user. The data collected should be necessary and adequate but not excessive for that purpose. The means of collection should be lawful and fair. DPP 2 requires data users to take all practicable steps to ensure that personal data is accurate and is not kept longer than is necessary for the fulfilment of the purpose for which the data is used. DPP 3 prohibits the use of personal data for any new purpose that is not, or is unrelated to, the original purpose when collecting the data, unless with the data subject's express and voluntary consent. A data subject can withdraw his or her consent given previously, by written notice. DPP 4 requires that data users take all practicable steps to protect the personal data they hold against unauthorised or accidental access, processing, erasure, loss or use. DPP 5 obliges data users to take all practicable steps to ensure openness of their personal data policies and practices, the kind of personal data held and the main purposes for holding it. DPP 6 provides data subjects with the right to request access to and correction of their own personal data. ^ Back to section

**55** [2021] 1 HKLRD 1301. ^ Back to section

**56** Cap. 1148. ^ Back to section

**57** As at 11 January 2023. ^ Back to section

**58** [2019] HKCA 617. ^ Back to section

**59** Cap. 59. ^ Back to section

**60** [2020] HKCA 752. ^ Back to section

**61** Cap. 41. ^ Back to section

**62** Cap. 32. ^ Back to section

**63** Cap. 32H. ^ Back to section

**64** Under Section 21 of the LARCO (Cap. 23), contributory negligence is a partial defence that can reduce damages claimed based on the claimant's share in the responsibility of the damage. The provisions are identical to the English Law Reform (Contributory Negligence) Act 1945. ^ Back to section

**65** See also Section II.iii. ^ Back to section

**66** Limitation Ordinance (Cap. 347). ^ Back to section

**67** [1986] 2 All ER 488; [1986] 2 Lloyd's Rep 179. ^ Back to section

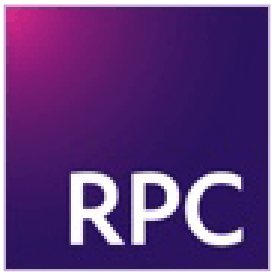
**68** [2004] 2 HKLRD 937. ^ Back to section

**69** [1999] Lloyd's Rep 758. ^ Back to section

**70** Cap. 609D. ^ Back to section

**71** Cap. 645. ^ Back to section

**72** Cap. 597. ^ Back to section

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# Netherlands

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## Summary

**INTRODUCTION**

**SPECIFIC PROFESSIONS**

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# Introduction

## i Legal framework

The liability of professionals under private law is regulated in the Dutch Civil Code (DCC). In addition, some professionals are subject to specific rules for their particular professional group (disciplinary law). If these rules are violated, a disciplinary court appointed for that purpose may impose a sanction. This sanction is separate from any liability under private law, but the judgment of a disciplinary court that a professional has acted contrary to disciplinary rules can be an important indication that there are also grounds for liability under private law.[2]

As a rule, a professional will act on the basis of a contract for services within the meaning of Section 7:400 of the DCC. The contract for services is an agreement in which one party, the contractor, undertakes, in relation to the other party, the client, to perform, other than on the basis of an employment contract, work that comprises something other than bringing about work of a tangible nature, the retention of goods, the publication of works or the transport, directly or indirectly, of persons or goods.

The liability of a professional is governed, therefore, in the first place by the general rules that apply to liability due to breach of contract. Under Section 6:74 of the DCC, the debtor is obliged to compensate the loss suffered by the creditor because of breach of contract, unless the breach cannot be attributed to the debtor. Therefore, three requirements apply: there must be a breach, a loss and a causal relationship.

In the case of professionals, a breach will, in many cases, be based on acts contrary to the contractor's duty of care. Under Section 7:401 of the DCC, a contractor must exercise the care of a good contractor in performing the contract. In addition, under the contract, the contractor may be subject to other specific obligations.

Case law has fleshed out further this duty of care. According to settled case law, a professional must act with the care that may be expected of a reasonably competent and reasonably acting professional.[3] The professional's actions must therefore be compared with the actions of a 'reference' professional. This standard is applied to professionals such as doctors, lawyers, accountants and insurance brokers.[4]

Under certain circumstances, the liability of a professional can also be based on non-contractual liability law. This requires that the professional's actions independently (i.e., separately from the contractual relationship) cause an unlawful act (tort).[5] Liability on the grounds of an unlawful act requires there to be unlawfulness, loss, culpability and a causal relationship.[6] Unlawfulness can consist of a violation of a right, or acting contrary to a statutory obligation or generally accepted principles according to unwritten law. In the case of acting contrary to a statutory obligation, however, the obligation to pay compensation only exists if the aim of the violated standard is to offer protection against loss suffered by the aggrieved party.[7]

## ii Limitation and prescription

The claims against a professional are subject to varying limitation periods. For claims for compensation under Section 3:310(1) of the DCC, a double limitation regime applies. A claim for compensation lapses five years after the start of the day following that on which the aggrieved party has gained knowledge of both the loss or the demandability of the penalty and the person liable for this, and, in any case, 20 years after the event that caused the loss or the penalty became due and payable. It concerns a 'subjective' limitation period of five years, linked to knowledge of the loss and the person liable, and an objective limitation period of 20 years starting from the moment of the event causing the loss. In the case of liability of professionals, the loss-causing event is the moment when the professional acts in breach of contract.

In addition, Section 3:307 of the DCC lays down that a claim for compliance lapses five years after the start of the day following that on which the claim became due and payable. It concerns the primary demand for compliance. A claim to repair the breach is governed by Section 3:311 of the DCC. On the grounds of that provision, a claim to repair a breach lapses five years after the start of the day following that on which the creditor gained knowledge of the breach and, in any case, 20 years after the breach occurred.

### iii Dispute fora and resolution

Proceedings for compensation due to the actions of a professional must be conducted before the civil courts in what are known as summons proceedings. Cases with a financial interest of less than €25,000 will be dealt with by the subdistrict court.

Court proceedings are largely conducted in writing and commence with the issue of a summons in which the claimant provides supporting arguments for his or her claim. The defendant can then respond to this in a statement of defence. Depending on the nature and extent of the case, both parties then have the opportunity to respond to each other again by way of a statement of reply and a rejoinder, and an oral hearing is held. The court then delivers its judgment. If needed, an appeal and then an appeal in cassation may be lodged. The party found against is ordered to pay the costs of the proceedings. These are not the actual costs of the proceedings but fixed amounts laid down by law.

Under Section 150 of the Dutch Code of Civil Procedure, the party relying on the legal consequences of certain facts and rights bears the burden of proof of these facts and rights. Briefly, in principle, this means that the claimant must provide evidence to substantiate the merits of his or her claim.[8] Evidence can be provided through all means, unless the law determines otherwise.[9] Frequently used forms of evidence are written documents, witness statements and an expert's report. In professional liability proceedings, a frequently occurring problem is that the information needed to assess whether the professional is in breach of contract lies in the domain of the contractor. In particular, it could concern medical liability, where the doctor possesses the necessary information on matters such as the course of events during an operation or medicines administered. In these kinds of cases, it is accepted in case law that a more onerous obligation to furnish facts rests with the contractor, requiring him or her to provide a reasoned contestation of the assertion that he or she has failed in his or her care, by presenting further arguments and evidence.[10]

Apart from the option of settling the dispute in court, the parties can also choose arbitration, a binding decision or mediation.

### iv Remedies and loss

Dutch law makes a distinction between tangible and intangible loss.[11] Tangible loss comprises both financial loss and loss of profits.[12] In addition, tangible loss includes the reasonable costs of preventing or limiting loss that may be expected as a result of the event on which liability is based, the reasonable costs of establishing the loss and liability, and the reasonable costs of obtaining an out-of-court settlement.[13]

The starting point is that tangible loss fully qualifies for compensation, while other loss (i.e., intangible loss) only qualifies for compensation in exceptional cases. According to Section 6:106 of the DCC, intangible loss qualifies for compensation if: (1) the liable person intended to cause such loss; (2) the aggrieved party has suffered bodily injury, or his or her reputation has been damaged or his or her person harmed in another manner; or (3) if the loss consists of harm to the memory of a deceased person and has been inflicted on the deceased's non-separated spouse, registered partner or relative to the second degree, provided that the harm has been inflicted in such a way that the deceased, were he or she to have been alive, would have been entitled to compensation for damage to his or her honour or reputation. In these three cases a claim for compensation exists, to be established in reasonableness and fairness.

## Specific professions

### i Lawyers

If a lawyer fails to fulfil a contract for services with his or her client, he or she will, in principle, be liable for the consequences of the failure. This liability is governed by the general rules that apply to liability due to breach of contract.[14] The extent of compensation is also determined in accordance with the general rules laid down in the DCC.[15]

When applying liability law, lawyers, as with all service providers belonging to the liberal professions, do face stricter standards than other service providers.[16] Under settled case law, a lawyer is required to exercise the care that may be expected of a reasonably competent and reasonably acting professional colleague.[17] This duty of care is elaborated further in the specific rules that apply to the profession, such as the Act on Advocates, the Legal Profession By-law and the Rules of Conduct.

Case law makes clear that a number of specific obligations rest with lawyers by virtue of their duty of care.[18] For example, the lawyer is required to represent all the legal interests of his or her client properly,[19] to enable the client to make informed choices[20] and to allow the client to choose what particular course of action to take, whether or not in court proceedings (and even if there is only a limited chance of success).[21]

The lawyer will not be automatically liable for the consequences of representing the interests of the client in relation to third parties.[22] According to the Supreme Court, the lawyer does not need to take account of potential interests of third parties, unless he or she can be reasonably expected to deduce from the information provided by the client, or from other circumstances, that justified third-party interests could be harmed in an unacceptable manner by the service the lawyer is asked to provide.[23] The liability of the lawyer in relation

to third parties is not based on breach of contract but, instead, on an unlawful act, since there is no contractual relationship between the lawyer and the third party.

If interested parties believe that a lawyer has failed in his or her duties, in addition to bringing liability proceedings, they may also file a disciplinary complaint. Anyone whose interests have been directly affected by the actions or omissions of a lawyer has the right to complain. A complainant will first submit his or her complaint to the dean of the relevant Bar association, the lawyer with regional supervisory authority. The dean will assess the complaint and try, if possible, to settle the dispute amicably. If he or she is unsuccessful, the complaint will be passed on to the relevant disciplinary court. In the first instance, the disciplinary courts are the four regional disciplinary boards. The Disciplinary Board of Appeal conducts disciplinary appeal proceedings.

The disciplinary court will test the disputed actions or omissions of the lawyer against the statutory disciplinary standard of Section 46 of the Act on Advocates. This standard stipulates that lawyers are subject to disciplinary rules in respect of (1) any actions or omissions contrary to the care that they are expected to exercise in respect of those whose interests they are or should be representing as such, (2) violations of the law,[24] and (3) actions or omissions not befitting a competent lawyer. This open disciplinary standard is elaborated further in the Act on Advocates, the Legal Profession By-law and the Rules of Conduct.

If the disciplinary court declares the complaint to be well founded, it may impose various measures. For example, the disciplinary court may give a warning or a reprimand, impose a fine of up to €22,500, suspend the lawyer for up to one year or strike the lawyer off the roll. The disciplinary court can also declare a complaint well founded without imposing a measure.

The lawyer is required to be sufficiently insured against the risk of professional liability.

'Sufficiently insured' is in any case taken to mean that the insurance provides sufficient cover for the risk of professional liability, in view of the nature and the extent of the lawyer's practice.[25]

## ii Medical practitioners

The liability of medical practitioners is governed by the customary rules of liability law. The liability of a practitioner cannot be limited or excluded.[26]

As a rule, medical assistance is given based on a medical treatment contract.[27] In these cases, breach of contract (the failure to fulfil the treatment contract[28]) is the basis for liability. A medical practitioner is in breach if he or she does not act as a 'good healthcare practitioner'.[29] He or she must exercise the due care that a reasonably competent and reasonably acting colleague would have exercised under the same circumstances.[30]

If the medical procedures are performed by a doctor acting independently, he or she will be considered a medical practitioner. If the doctor performs the medical procedures as an employee (of a hospital, other healthcare institution or other doctor), the employer will be considered the medical practitioner.[31] If medical procedures take place in a hospital that is not party to the treatment contract, the hospital (in addition to the medical practitioner) is also liable for a breach of the treatment contract as if it were party to the contract.[32]

An unlawful act[33] can also form the basis for medical liability if: (1) the violation of standards constitutes an unlawful act separate from the breach of the treatment contract; (2) the medical assistance was not given under the terms of a treatment contract; or (3) a third party who was not party to the treatment contract suffers loss. The standard of care in these cases is the same as the standard that applies in the context of a treatment contract.[34]

The professional standard that a good healthcare practitioner should uphold on the grounds of Section 7:453 of the DCC is largely determined by means of self-regulation within the medical profession. The Netherlands has many professional medical organisations that draw up rules of conduct, professional codes, guidelines and protocols.

In assessing whether a medical practitioner is acting as a good medical practitioner, disciplinary rules are also significant.[35] The Individual Healthcare Professions Act regulates disciplinary rules for medical professionals in the Netherlands. Disciplinary tribunals cannot award compensation.[36]

Healthcare providers are required to have a proper complaints and disputes procedure in place. The Healthcare Quality, Complaints and Disputes Act contains obligations for healthcare providers in this respect. For example, a healthcare provider must be affiliated to a dispute settlement body accredited by the government. This dispute settlement body is authorised to award compensation of up to €25,000.[37]

The burden of proof rests with the aggrieved party as regards the causal relationship between the conduct of the healthcare practitioner and the injury suffered.[38] However, the duty to provide information is more onerous for the doctor being sued. A doctor is expected to provide sufficient factual information to justify his or her contestation of the patient's assertions, so that the patient is given points of reference for providing evidence.[39] For this purpose, a doctor must give as accurate an account of what occurred during the medical treatment as possible and must provide the information that he or she, as a doctor, has or may have at his or her disposal.[40] Although there is no categorical reversal of the burden of proof in the Netherlands, a 'reversal rule' may be applied under certain circumstances.[41] If a medical practitioner acts contrary to a standard that aims to prevent a specific danger, and this specific danger has occurred in the case at issue, a *sine qua non* relationship between the conduct and the harm is assumed.[42] Such a standard is usually laid down in rules of conduct and protocols drawn up by the professional medical group itself. The doctor who acts contrary to a rule of conduct or protocol must demonstrate that he or she was justified (i.e., he or she acted in the interests of good patient care) in deviating from the rule of conduct or the protocol.[43]

Although medical practitioners are not required to take out medical liability insurance, virtually all of them do so in practice. Policy conditions for professional liability insurance cannot forbid a medical practitioner from admitting that he or she made mistakes or offering his or her apologies.[44]

### iii Banking and finance professionals

The liability of bank employees and other professionals within the financial sector is governed by the customary rules of liability law. The same applies to the liability of financial institutions themselves. In short, there are no rules for liability in this sector that deviate from the norm.

However, according to settled case law of the Supreme Court, financial institutions do have a special duty of care towards private individuals in certain situations, such as giving investment advice.[45] This special duty of care ensues from the public position of financial services providers in connection with their professional expertise. The contents and scope of the duty of care depend on the specific circumstances of each case. A violation of the duty of care by a financial services provider can lead to liability on the grounds of an unlawful act[46] or breach of contract,[47] in which case the financial institution must compensate the loss suffered by the aggrieved party.

In addition, there is specific legislation to which financial institutions such as banks must adhere. These include the Financial Supervision Act (Wft) and European regulations that have direct force in the Netherlands.[48] These laws also affect the duty of care of financial institutions. For example, Section 4:24a of the Wft contains a general duty of care provision. The Dutch Central Bank (DNB) and the Dutch Authority for the Financial Markets (AFM) oversee financial institutions' compliance with the Wft. DNB conducts prudential supervision and AFM supervises conduct. In that context, they also have the option of taking enforcement action.

Every financial services provider within the meaning of the Wft is required to have an internal complaints procedure in place.[49] If an aggrieved customer has followed the internal complaints procedure, he or she may then bring compensation proceedings before the Financial Services Complaints Tribunal (Kifid).[50] Alternatively, the customer always has the option of bringing court proceedings without first following the internal complaints procedure.

In addition, financial institutions are required to have their employees take an oath or make a solemn affirmation.[51] Furthermore, since 1 January 2015, banks have been required to ensure that compliance with the banker's oath by their employees is guaranteed in disciplinary law.[52] This obligation is set out in concrete terms by including the rules of conduct of the Dutch Banking Association in the banker's oath.[53] If a bank employee violates one or more rules of conduct, a complaint may be filed with the Foundation for Banking Ethics Enforcement. The Foundation can impose various measures, such as obligatory training, a fine or a ban on working in the banking sector for up to three years.-[54] In this way, bank employees can be held individually responsible for their professional conduct.[55]

Employees of financial institutions other than banks are not legally bound by disciplinary rules. However, the financial sector is subject to self-regulation. The Dutch Securities Institute (DSI) has drawn up a code of conduct for financial professionals registered with the DSI, such as investment consultants and asset managers.[56] The DSI has its own complaints procedure and a disciplinary tribunal. In response to a complaint from an interested party or the chairman of the DSI, the disciplinary tribunal can take various measures, such as issuing a reprimand, or imposing a fine or suspension.[57]

There is no general insurance obligation for employees of a financial institution. Under Section 4:74b of the Wft, however, a mortgage broker must have professional liability insurance or equivalent provision. Banks and insurers, including licensed ones, are not subject to this obligation because they are already subject to prudential supervision by DNB.[58]

### iv Computer and information technology professionals

The liability of computer and information technology (IT) specialists is governed by the ordinary rules of liability law.

Computer and IT specialists are not legally recognised professionals and are not subject to any non-standard rules. However, there is talk of developing a duty of care standard for IT specialists regarding cybersecurity.[59]

There is no statutory insurance obligation for computer and IT specialists. It is worth noting that the Dutch government uses a model agreement and general terms and conditions when entering into contracts for IT products and services: the General Government Terms and Conditions for IT Contracts 2022. These terms and conditions lay down, among other things, that IT service providers who enter into a contract with the Dutch government must have third-party liability insurance[60] and professional liability insurance.[61]

### v Real property surveyors

Real estate professionals include estate agents and valuers. Their liability is governed by the ordinary rules of liability law.

As a rule, an estate agent works based on a special contract for services, an agency contract.[62] He or she is expected to represent only the interests of his or her client. Generally speaking, the basis for liability of an estate agent is breach of contract.[63] The basis for liability of an estate agent in relation to a third party, such as the opposite party to his or her client, is an unlawful act.[64] In both cases, the same standard of care applies: the estate agent must act as a reasonably competent and reasonably acting estate agent would act under the same circumstances.[65]

The level of care that may be expected of an estate agent is largely determined through self-regulation within the estate agency sector. The Netherlands has three professional associations: the Dutch Association of Real Estate Brokers and Real Estate Experts (NVM), the Association of Real Estate Brokers, Valuers and Letting Agents (VBO), and VastgoedPro, the professional association for real estate professionals. They draw up rules of conduct that in principle only apply to the members of the individual associations, but one rule of conduct, the NVM Measurement Instruction, is deemed by the Supreme Court also to be decisive for the public propriety of non-NVM members.[66] In addition to professional associations, the Netherlands has two registers for estate agents that meet certain qualifications and competence requirements: the registers of the VastgoedCert Foundation and the Foundation for the Certification of Estate Agents (SCVM).

The Disciplinary Tribunal for Real Estate Professionals deals with disciplinary complaints, in the first instance and on appeal, concerning estate agents, as well as valuers affiliated to the NVM, VBO and VastgoedPro, or listed with the VastgoedCert Foundation or SCVM. The Disciplinary Tribunal cannot award compensation. Consumers with a complaint about the same professionals can also turn to the Property Professionals Complaints Bureau.

There are two dispute resolution committees, one for the consumer market and one for the business market that clients of estate agents who are affiliated to the NVM, VBO and VastgoedPro can turn to with their complaints. The dispute resolution committees are authorised to award compensation of up to €10,000.

Most estate agents are also valuers. Unlike an estate agent, a valuer is expected to be impartial. A valuer must act as a reasonably competent and reasonably acting professional colleague.[67] In particular, he or she must guarantee, within reasonable limits, the accuracy of a valuation report, the viewpoints used in it and the care taken in the underlying survey.-[68] In a recent case where two parties had each given their own valuers the instruction to appraise the increase in value of a commercial property and then to arrive at a joint, binding opinion, the Supreme Court ruled that they were required to act independently in relation to their clients, that they must take account of the interests of all clients and, in performing their instruction, they must hear the arguments of both parties.[69]

The care that may be expected of a valuer is largely determined through self-regulation within the property valuation sector. The Dutch Register of Real Estate Valuers (NRVT) draws up rules of conduct and regulations for this purpose. If a valuer listed in the NRVT register does not abide by these rules, a complaint may be filed with the NRVT Foundation for Disciplinary Proceedings. The complaint will be dealt with in the first instance and on appeal by a disciplinary tribunal formed by this Foundation. The disciplinary tribunal is not permitted to award compensation.

Estate agents and valuers are not required to take out insurance.

### vi Construction professionals

The liability of construction professionals is also governed by the ordinary rules of liability law.

As a rule, a construction professional works on the basis of a works contract.[70] He or she ensures that the work he or she is undertaking for his or her client fulfils the requirements the work must meet with a view to its intended purpose. Among other things, this includes warning his or her client about inaccuracies in the contract details.[71] If the construction professional is in any doubt as to whether the contract details contain inaccuracies, he or she must request information from the client.[72] The construction professional must be familiar with relevant legislation, regulations and safety standards. Construction professionals are liable for defects in the work until the moment of delivery. Following delivery, the contractor is discharged from liability for defects that the client should reasonably have discovered.[73] From then on, the construction professional is only liable for defects that the client could not reasonably have discovered. This latter rule is changing. With the entry into force of the Quality Assurance (Building Sector) Act (Wkb) on 1 January 2024, the construction professional will, in principle, be responsible for all hidden defects.-[74]

In practice, construction professionals often engage subcontractors. In principle, the main contractor is liable for the actions of the subcontractor.[75] The client can have direct recourse against the subcontractor if the failure of the subcontractor in relation to the main contractor is also an unlawful act[76] in relation to the client.[77] It is argued in the literature that the subcontractor can then rely on the exoneration clauses agreed between the main contractor and the client. Case law is ambiguous on this point.[78]

There are many national and decentralised rules for the construction sector. The municipalities oversee compliance with these rules. The municipality will check the construction plans before construction work begins and then oversee the work as it

progresses. However, this regime is changing. The Wkb will enter into force simultaneously with the new Environment and Planning Act on 1 January 2024. Under the Wkb, supervision during construction will be carried out by private, independent and certified quality assurance organisations engaged by the client. If a problem is found, the municipality can call a halt to construction.

There is little self-regulation in the construction sector. However, the Governance Code for Safety in the Construction Sector is worth mentioning in this context and it contains safety regulations. No disciplinary proceedings are in place for the sector.

Construction professionals are not required to take out insurance.

### vii Accountants and auditors

Accountants (and auditors in the case of an audit) fulfil a gatekeeper function. When performing an audit on behalf of a client, they add a level of certainty to the financial reports of all kinds of organisations. The basic work involves verifying, identifying and warning.

As regards the statutory audit of financial statements, under Section 2:393(1) of the DCC an instruction can be given to an individual accountant or an accountancy organisation. Section 2:393(3) of the DCC requires that the accountant examines whether the financial statements provide the required insight as referred to in Section 2:362(1) of the DCC.[79] The outcome of the audit is set out by the accountant in an audit opinion on the truth and fairness of the financial statements. This audit report takes the form of an unqualified audit opinion, a qualified opinion, an adverse opinion or a disclaimer of opinion.[80]

For an audit of financial statements, a contract for services exists between the accountant (or the accountant's firm) and the client. This is also the case when the accountant receives different types of instructions from the client, such as one to perform an investigation, whether person-related or not.

In performing work for the client, the accountant must exercise the care expected of a good contractor.[81] This standard has been elaborated further by the Supreme Court, stating that the professional should act 'as may be expected of a reasonably competent and reasonably acting professional colleague'.[82]

The accountant must render account to the client on the way in which he or she has performed the instruction.[83] The duty to render account is to enable the client to verify the work performed by the accountant and, therefore, also includes the obligation to provide information about the work arising from and performed according to the instruction, together with supporting documents if necessary.[84]

Generally speaking, therefore, the accountant must report (whether with or without supporting documents) on what he or she has done and must explain why he or she set to work in the manner reported.[85] How far the accountant should go in this depends on the instruction: it is always about what the nature of the instruction reasonably entails given the circumstances of the case.[86] Also relevant are the relationship between the parties, their expertise and the rules of conduct and professional rules applicable to the contractor.[87] As regards this accountability, the accountant's audit opinion referred to above plays a role. This opinion must clearly express the accountant's view of the financial summaries.[88] If the accountant does not fulfil the work satisfactorily under the terms of the contract for services, this constitutes a breach of contract.[89]

The accountant also has a special duty of care towards third parties such as financiers, shareholders, suppliers and creditors. These third parties must be able to trust an audit opinion of the financial statements.[90] The scope of the duty of care in relation to third parties is greater when the accountant performs work in the context of his or her statutory duty than when performing work that falls outside it.[91] The prevailing view in the literature is that the liability of a professional (and, therefore, also an accountant) towards third parties must be based on an unlawful act. This also follows from various rulings concerning accountants, lawyers, civil-law notaries and financial institutions, among others.[92]

A liability claim against an accountant or an accountancy firm is regularly preceded by disciplinary proceedings against the accountant concerned. If interested parties believe that the accountant has made mistakes, a complaint may be filed under the disciplinary rules for accountants.

Disciplinary rules for accountants are laid down by law in the Accountants (Disciplinary Law) Act. Disciplinary rules for accountants are readily accessible; anyone may file a disciplinary complaint. The complainant does not need to have a demonstrably direct interest. The Dutch Authority for the Financial Markets and the Royal Netherlands Institute of Chartered Accountants may also file a complaint.

The disciplinary complaint against an accountant will be dealt with by the Accountancy Division in Zwolle. The Accountancy Division can only deal with a complaint if no more than 10 years have passed between the moment of the accountant's actions or omissions and the filing of the complaint. The Accountancy Division procedure in dealing with complaints submitted is described in the rules of procedure of the Accountancy Division. It is possible to lodge an appeal before the Trade and Industry Appeals Tribunal in The Hague against the final decision of the Accountancy Division within six weeks of the final decision being sent. No further appeal is possible against a ruling of the Trade and Industry Appeals Tribunal.

In the case of a disciplinary complaint against an accountant, it must be ascertained whether the professional actions (or omissions) of the accountant are contrary to the rules of conduct and professional rules and whether the professional actions of the accountant are contrary to the interests of a proper exercise of the accountancy profession. For example, in disciplinary proceedings, the question may be whether the accountant has performed his or her auditing work with a professional and critical attitude and in sufficient depth and has documented it sufficiently.

The focus of disciplinary proceedings is not an assessment of the financial statements, nor whether the financial statements have been prepared in accordance with the applicable rules; such an assessment is the preserve of the Enterprise Court at the Amsterdam Court of Appeal.

The assessment of the methods used by an accountant in investigations, including person-related ones, is tested against the fundamental principles laid down in the Code of Conduct and Professional Practice for Accountants Regulation to determine whether these principles been correctly applied. Furthermore, the guidelines of the NBA also play a role. NBA guidelines are designed to give accountants further directions in the exercise of a specific element of the accountancy profession.

A favourable opinion by the disciplinary court may be of interest to the complainant before the civil court in answering the question whether the accountant is liable for compensation.

Even if the disciplinary court concludes that the accountant has acted contrary to the applicable standards and rules, this may not automatically lead to the conclusion that the accountant is liable under civil law for violating a standard of care, but such an opinion by the disciplinary court may well be of value in civil proceedings. If the civil court takes a different view from that of the disciplinary court, it must give reasons for its opinion in such a way as to be sufficiently understandable, even in the light of the disciplinary court's assessment.[93]

### viii Insurance professionals

The liability of insurance professionals is governed by the ordinary rules of liability law.

The Wft regulates the legal position of the three parties involved in the insurance contract. These are the insurer, the insurance intermediary (i.e., the insurance broker or consultant) and the authorised agent or sub-agent of the insurer, who are all 'financial services providers' as referred to in Section 1.1 of the Wft.[94]

The Dutch Central Bank (DNB) conducts prudential supervision and the Dutch Authority for the Financial Markets (AFM) supervises the conduct of financial services providers within the meaning of the Wft. The supervisory bodies impose sanctions if financial services providers do not abide by the rules of the Wft. This may be in the form of a fine or, in the most serious cases, a revocation of their licence.

As regards the financial services providers regulated in the Wft, there is a special complaints office, Kifid. As an alternative to bringing the matter to court, an insured with a complaint can go through a dispute settlement procedure at Kifid. Kifid is subject to a certain level of government supervision.

The insurance sector also follows a self-regulation procedure. The Code of Conduct for Insurers, drawn up by the Dutch Association of Insurers, forms the basis of the many codes of conduct and protocols. The Disciplinary Board for Financial Services (Insurance) assesses complaints on the basis of the binding self-regulation procedure of the Dutch Association of Insurers. The Disciplinary Board cannot award compensation as a measure. Compliance with self-regulation is also monitored by the Foundation for the Assessment of Insurers.

Special attention is appropriate for insurance intermediaries who act as agents between the insured and the insurer. An insurance intermediary must exercise the care of a good contractor in his or her work.[95] That means that he or she must exercise the care in relation to the client that may be expected of a reasonably competent and reasonably acting professional colleague. This duty of care is elaborated further in case law.[96] Briefly, an insurance intermediary must provide both the insured and the insurer with the information they need to look after their interests properly, and if the intermediary is not familiar with this information, he or she must actively make enquiries about it.[97] The intermediary's duty of care does not extend to verifying the accuracy of the information provided.[98] There are certain factors that are relevant for each case and these are weighed up to ascertain whether an insurance intermediary has fulfilled the duty of care.[99]

Insurance professionals are not required to take out insurance.

## Year in review

During the past year we have increasingly seen the conduct of professionals being assessed not only by the civil courts but also, and first of all, by the disciplinary courts. These disciplinary proceedings are often a prelude to civil proceedings for claiming compensation.

## Outlook and future developments

In dispute resolution involving certain professionals, such as accountants, the emphasis appears to be shifting somewhat from civil court proceedings to proceedings before the disciplinary courts. Not infrequently, a clear decision in the disciplinary court leads to the possibility of reaching an amicable settlement in favour of the complainant or, if the complaints filed against the professional are dismissed, to a decision to forgo civil court proceedings. This trend is expected to continue in the coming years.

Endnotes

1. Thijs van Zanten, Noor Zetteler and Ida Lintel are partners and Lauret van den Reek and Eveline Neele are associates at Wijn & Stael Advocaten. The authors thank professional support lawyers Emil Verheul and Nick Haasjes for their valuable support. ^ Back to section

2. See E.A.L. van Emden & M. de Haan,*Beroepsaansprakelijkheid*, Deventer: Kluwer 2014, pp. 21–22. ^ Back to section

3. See E.A.L. van Emden & M. de Haan,*Beroepsaansprakelijkheid*, Deventer: Kluwer 2014, pp. 15–17 and Asser/Tjong Tjin Tai 7-IV 2022, No. 200. ^ Back to section

4. See Asser/Tjong Tjin Tai 7-IV 2022, No. 200. ^ Back to section

5. See Asser/Tjong Tjin Tai 7-IV 2022, No. 198. ^ Back to section

6. Section 6:162(1) of the Dutch Civil Code (DCC). ^ Back to section

7. Section 6:163 DCC. ^ Back to section

8. See E.A.L. van Emden & M. de Haan,*Beroepsaansprakelijkheid*, Deventer: Kluwer 2014, pp. 17–20 and Asser/Tjong Tjin Tai 7-IV 2022, No. 205. ^ Back to section

9. Section 152 of the Dutch Code of Civil Procedure (DCCP). ^ Back to section

10. See E.A.L. van Emden & M. de Haan,*Beroepsaansprakelijkheid*, Deventer: Kluwer 2014, pp. 17–20 and Asser/Tjong Tjin Tai 7-IV 2022, No. 205. ^ Back to section

11. Section 6:95 DCC. ^ Back to section

**12** Section 6:96(1) DCC. ^ Back to section

**13** Section 6:96(2) DCC. ^ Back to section

**14** Section 6:74 DCC. ^ Back to section

**15** See Asser/Tjong Tjin Tai 7-IV 2022, No. 213. ^ Back to section

**16** See Asser/Tjong Tjin Tai 7-IV 2022, No. 194. ^ Back to section

**17** See Supreme Court 9 June 2000, Dutch Law Reports 2000/460 and Supreme Court 7 March 2003, Dutch Law Reports 2003/302. ^ Back to section

**18** See Asser/Tjong Tjin Tai 7-IV 2022, No. 202. ^ Back to section

**19** See Supreme Court 1 November 1991, Dutch Law Reports 1992, No. 121. ^ Back to section

**20** See Supreme Court 29 May 2015, Dutch Law Reports 2015/267 and Supreme Court 18 September 2015, Dutch Law Reports 2016/66. ^ Back to section

**21** See Supreme Court 28 June 1991, Dutch Law Reports 1992/420. ^ Back to section

**22** See Supreme Court 25 November 1997, Dutch Law Reports 1998/261 and EHCR 28 October 2003, Dutch Law Reports 2004/555. ^ Back to section

**23** See Supreme Court 17 January 2020, Dutch Law Reports 2020/137. ^ Back to section

**24** The Act on Advocates, the Money Laundering and Terrorist Financing (Prevention) Act and the by-laws of the Netherlands Bar. See Section 46 of the Act on Advocates. ^ Back to section

**25** See Section 6.24 of the Legal Profession By-law. ^ Back to section

**26** Section 7:463 DCC. ^ Back to section

**27** Section 7:446 DCC. ^ Back to section

**28** Section 6:74 DCC. ^ Back to section

**29** Section 7:453 DCC. ^ Back to section

**30** Section 7:462 DCC. See R.P. Wijne,*Medische aansprakelijkheid*, Nijmegen: Ars Aequi Libri 2019, pp. 48–52 and Supreme Court 9 November 1990, Dutch Law Reports 1991/26. ^ Back to section

**31** See R.P. Wijne,*Medische aansprakelijkheid*, Nijmegen: Ars Aequi Libri 2019, pp. 16–27. ^ Back to section

**32** See Asser/Tjong Tjin Tai 7-IV 2022, No. 457. ^ Back to section

**33** Section 6:162 DCC. ^ Back to section

**34** Section 7:453 in conjunction with 7:464 DCC. See R.P. Wijne,*Medische aansprakelijkheid*, Nijmegen: Ars Aequi Libri 2019, pp. 76–84 and R.P. Wijne, *De geneeskundige behandelingsovereenkomst* (DCC monographs No. B87), Deventer: Wolters Kluwer 2021/28-31, pp. 102–116. ^ Back to section

**35** See Asser/Tjong Tjin Tai 7-IV 2022, No. 45. Cf. also Supreme Court 19 March 2004, Dutch Law Reports 2004/307. ^ Back to section

**36** Cf. Section 48(1) of the Individual Healthcare Professions Act. ^ Back to section

**37** Section 20 of the Healthcare Quality, Complaints and Disputes Act. ^ Back to section

**38** Section 150 DCCP. ^ Back to section

**39** See Supreme Court 20 November 1987, Dutch Law Reports 1988/500. ^ Back to section

**40** See Supreme Court 7 September 2001, Dutch Law Reports 2001/615. ^ Back to section

**41** See Asser/Tjong Tjin Tai 7-IV 2022, No. 453. ^ Back to section

**42** See R.P. Wijne,*Medische aansprakelijkheid*, Nijmegen: Ars Aequi Libri 2019, pp. 112–116. ^ Back to section

**43** See Supreme Court 2 March 2001, Dutch Law Reports 2001/649 and Asser/Tjong Tjin Tai 7-IV 2022, No. 451. ^ Back to section

**44** Section 7:953 DCC. ^ Back to section

**45** See, for example, Supreme Court 23 May 1997, Dutch Law Reports 1998/192, with commentary from C.J. van Zeben, Supreme Court 11 July 2003, Dutch Law Reports 2005/103 with commentary from C.E. Du Perron and Supreme Court 8 February 2013, Dutch Law Reports 2014/497, with commentary from J. Hijma. Meanwhile it is argued that the special duty of care for financial services providers also applies to non-private parties. See, for example, D. Busch, '*De civiele zorgplicht van banken tegenover professionele beleggers − renteswaps met (semi)publieke instellingen en het mkb*', in: D. Busch, C.J.M Klaassen & T.M.C. Arons (ed.), *Aansprakelijkheid in de financiële sector*, Deventer: Kluwer 2013, pp. 543–563 and Asser/De Serière 2-IV, 2018, No. 758. ^ Back to section

**46** Section 6:162 DCC. Back to section

**47** Section 6:74 DCC. Back to section

**48** See in more detail: M. van Eersel,*Handhaving in de financiële sector*, Deventer: Wolters Kluwer 2022, p. 31. Back to section

**49** Section 4:17 of the Financial Supervision Act (Wft). Back to section

**50** See V.Y.E. Caria, '*Het tuchtrecht voor bankiers. Een zoektocht naar de maatschappelijke positie van het bankwezen.*', AA 2016/0535. Back to section

**51** Section 3:17b Wft. Back to section

**52** Section 3:17c Wft. Back to section

**53** Accessed via Toekomstgericht Bankieren (nvb.nl). Back to section

**54** Section 5.6.2.1 of the Disciplinary Rules for the Banking Sector. Accessed via Tuchtrecht (Toekomstgericht bankieren) (nvb.nl). Back to section

**55** For more details on the subject, see: V.Y.E. Caria, '*Het tuchtrecht voor bankiers. Een zoektocht naar de maatschappelijke positie van het bankwezen.*', AA 2016/0535. Back to section

**56** See M. van Eersel,*Handhaving in de financiële sector*, Deventer: Wolters Kluwer 2022, p. 143. Back to section

**57** For more details on the complaints procedure at the DSI, see: M. van Eersel,-*Handhaving in de financiële sector*, Deventer: Wolters Kluwer 2022, p. 143. Back to section

**58** Concerning the comparable Section 4:75 of the Wft for insurance brokerage, see: A.Ch.H. Franken, in:*Toezicht Financiële Markten*, Section 4:75 Wft, annotation 10. Back to section

**59** See B. Nieuwesteeg et al., '*Op naar een zorgplichtstandaard voor cybersecurity*', Nationaal Cyber Security Lab, Lab session #1, Position Paper 23 April 2021 and B. Nieuwesteeg et al., '*Contractuele aansprakelijkheid voor digitale onveiligheid in B2B relaties*', AV&S 2020/22, pp. 129–135. Back to section

**60** Section 29 of the General Government Terms and Conditions for IT Contracts 2022 (ARBIT-2022). Back to section

**61** Sections 52 and 79 ARBIT-2022. Back to section

**62** Section 7:425 DCC. Back to section

**63** Section 6:74 DCC. ^ Back to section

**64** Section 6:162 DCC. ^ Back to section

**65** For a comprehensive overview of case law and literature, see: V.Y.E. Caria, '*Makelaar*', in: *GS Onrechtmatige daad, Deventer*: Wolters Kluwer 2016/VI.5.12. ^ Back to section

**66** See Supreme Court 13 July 2018, Dutch Law Reports 2020/7. ^ Back to section

**67** See R.A.D. Blaauw, '*Aansprakelijkheid van de taxateur van onroerende zaken-*', *Bouwrecht* 2010/139, p. 730 *et seq.*; cf. opinion of Advocate General F.F. Langemeijer, prior to Supreme Court 5 March 2010, ECLI:NL:HR:2010:BK9634. ^ Back to section

**68** See B. ten Doesschate & B.J. Essink, '*Aansprakelijkheid van de taxateur: de waarde van de waardering*', *Vastgoed Fiscaal & Civiel* 2012, pp. 12–15. Cf. also 's-Hertogenbosch Court of Appeal 15 January 2019, ECLI:NL:GHSHE:2019:90. ^ Back to section

**69** See Supreme Court 2 June 2023, ECLI:NL:HR:2023:822, in which Ida Lintel and Thijs van Zanten acted for the appellant in cassation. ^ Back to section

**70** Section 7:750 DCC. ^ Back to section

**71** Section 7:754 DCC. ^ Back to section

**72** See, for example, Court of Limburg 22 December 2021, ECLI:NL:RBLIM:2021:9942. ^ Back to section

**73** Section 7:758(3) DCC. ^ Back to section

**74** Draft Section 7:758(4) DCC. ^ Back to section

**75** Section 6:76 in conjunction with 7:751 DCC. ^ Back to section

**76** Section 6:162 DCC. ^ Back to section

**77** See Asser/Van den Berg & Van Gulijk 7-IV 2022, No. 203. ^ Back to section

**78** See Asser/Van den Berg & Van Gulijk 7-IV 2022, No. 207. ^ Back to section

**79** Under Section 2:393(8) DCC, any interested party of the legal entity may demand compliance with the obligation to have the financial statements audited by an accountant. ^ Back to section

**80** Section 2:393(2) DCC. ^ Back to section

**81** Section 7:401 DCC. ^ Back to section

**82** See Supreme Court 9 November 1990, Dutch Law Reports 1991/26. ^ Back to section

**83** Section 7:403(2) DCC. ^ Back to section

**84** See Asser/Tjong Tjin Tai 7-IV 2014, No. 112, Supreme Court 26 April 1996, Dutch Law Reports 1996/490, para. 3.8 and Court of Utrecht 5 June 2009, ECLI:NL:RBUTR:2009:BI6346,*JOR* 2009/260, para. 4.3–4.5. Cf. also B. Wessels, '-*Algemene bepalingen inzake de overeenkomst van opdracht*', in: C.C. van Dam et al., *Opdracht en dienstverlening*, Zwolle: W.E.J. Tjeenk Willink 1994, p. 21. ^ Back to section

**85** Cf. C.J. van Zeben et al.,*Compendium Bijzondere overeenkomsten*, Deventer: Kluwer 1998, p. 337, B. Wessels, '*De verbintenis tot zorgvuldig vermogensrechtelijk beheer*', VrA 2005, 3, p. 59 and B. Wessels, '*Algemene bepalingen inzake de overeenkomst van opdracht*', in: C.C. van Dam et al., *Opdracht en dienstverlening*, Zwolle: W.E.J. Tjeenk Willink 1994, p. 21. ^ Back to section

**86** See Asser/Tjong Tjin Tai 7-IV 2014, No. 112, C.J. van Zeben et al.,*Compendium Bijzondere overeenkomsten*, Deventer: Kluwer 1998, p. 337 and B. Wessels, '*Algemene bepalingen inzake de overeenkomst van opdracht*', in: C.C. van Dam et al., *Opdracht en dienstverlening*, Zwolle, W.E.J. Tjeenk Willink 1994, p. 21 and W.C.L. van der Grinten, Lastgeving (Mon. DCC No. B81), Deventer: Kluwer 1993, p. 17. ^ Back to section

**87** See B. Wessels, '*De verbintenis tot zorgvuldig vermogensrechtelijk beheer*', VrA 2005, 3, p. 59. ^ Back to section

**88** NV COS Standaard 700. See also J.E. Brink-van der Meer,-*Accountsaansprakelijkheid* (dissertation at Amsterdam VU, *Recht en praktijk. Contracten- en aansprakelijkheidsrecht*, CA20), Deventer: Wolters Kluwer 2018, p. 176. ^ Back to section

**89** Section 6:74 DCC. ^ Back to section

**90** See Supreme Court 13 October 2006,*JOR* 2006/296 (Vie d'Or). ^ Back to section

**91** See Supreme Court 16 December 2016,*RvdW* 2017/18, Supreme Court 29 January 2021, *JOR* 2021/105. ^ Back to section

**92** See J.E. Brink-van der Meer,*Accountsaansprakelijkheid* (dissertation at Amsterdam VU, *Recht en praktijk. Contracten- en aansprakelijkheidsrecht*, CA20), Deventer: Wolters Kluwer 2018, p. 187 and the rulings by the Supreme Court included therein of 13 October 2006, ECLI:NL:HR:2006:AW2080, *JOR* 2006/296 (Vie d'Or), Supreme Court 18 January 2008, *JOR* 2008/83, Supreme Court 23 December 1994, ECLI:NL:HR:1994:AD2277 and Dutch Law Reports 1996/627-628 and Supreme Court 15 September 1996, Dutch Law Reports 1996/629 (Tilburgse Hypotheekbank rulings), Supreme Court 19 June 1998, Dutch Law Reports 1999/288 (E/Insolvency Practitioners THB I) and Supreme Court 23 December 2005, Dutch Law Reports 2006/289 (Safe Haven). ^ Back to section

**93** Supreme Court 22 September 2017,*JOR* 2018/30, with commentary from De Haan. ^ Back to section

**94** See Asser/Wansink, Van Tiggele & Salomons 7-IX 2019, No. 46. ^ Back to section

**95** Section 7:401 DCC. ^ Back to section

**96** See Asser/Tjong Tjin Tai 7-IV 2022, No. 201 and M.J. Bruins Slot, '*De zorgplicht van de assurantietussenpersoon en onderverzekering*', *Maandblad voor Vermogensrecht* 2020, pp. 110–121. ^ Back to section

**97** See, for example, Supreme Court 22 November 1996, Dutch Law Reports 1997/718, Supreme Court 9 January 1998, Dutch Law Reports 1998/586, Supreme Court 11 December 1998, Dutch Law Reports 1999/650, Supreme Court 29 January 1999, Dutch Law Reports 1999/651 and Supreme Court 10 January 2003, Dutch Law Reports 2003/375. ^ Back to section

**98** See Supreme Court 13 April 2012, Dutch Law Reports 2012/247. ^ Back to section

**99** See F. van der Woude et al., '*Kroniek zorgplicht assurantietussenpersoon*', AV&S 2017/6, pp. 32–43. ^ Back to section



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# Portugal

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## Summary

**INTRODUCTION**
**SPECIFIC PROFESSIONS**
**YEAR IN REVIEW**
**OUTLOOK AND FUTURE DEVELOPMENTS**
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# Introduction

## i Legal framework

Professional liability is subject to the tort liability or contractual liability legal framework, depending on whether there is a contractual relationship between the parties to the dispute. Pre-contractual liability may be applicable in some cases.

The general legal framework of tort and contractual liability is established in the Portuguese Civil Code (PCivC).[2] Specific acts of professional misconduct may also be considered crimes or administrative infractions governed by the Portuguese Criminal Code or specific criminal and administrative laws (for instance, the Legal Framework of Credit Institutions and Financial Companies (RGICSF), the Portuguese Securities Code and the Legal Framework on the Taking-up and Pursuit of the Business of Insurance and Reinsurance).

Additionally, there are sectoral laws that set out specific rules on the liability of specific professionals or complement the general legal framework established in the PCivC (for instance, the Portuguese Companies Code[3]).

As general rule, professional liability claims must meet all the following requirements: (1) unlawful conduct (either by act or by omission) of the professional defendant; (2) guilt of either wilful or negligent misconduct (except in cases of strict liability); (3) causal link between the conduct of the professional and the relevant damage claimed by the claimant; and (4) damage suffered (either actual losses or the loss of profit).

While these general requirements should apply to both, there are important differences between the legal frameworks for tort and contractual liability; for example: (1) the claimant has the burden of proof under both regimes, but the professional is presumed guilty in cases of contractual liability and has the burden to rebut this presumption; (2) limitation periods applicable to contractual liability are longer than limitation periods applicable to tort liability; (3) in tort liability the court may award compensation lower than the amount of the actual damage (based on the *ex aequo et bono* criterion) with reference to the degree of guilt of the professional, financial status of the parties and further circumstances of the case; and (4) unlike the contractual liability established in the PCivC, joint and several liability is applicable to tort liability (and also to commercial obligations).

Where there is concurrent tort and contractual liability, the majority of case law and legal scholars argue that the claimant is entitled to choose the applicable legal framework and should, therefore, weigh up the pros and cons of each regime – even though this choice is subject to modification by the court.[4]

Unlawful conduct by the professional may consist of a breach of contractual conditions or a specific duty of care (either by act or by omission). In this regard, the claimant will have to prove that the professional acted below the standards of a reasonable and competent professional with reference to the average standards applicable to his or her profession at the time that the relevant facts occurred (for instance, a surgeon who performed surgery without complying with the mandatory sterilisation protocol or a contractor who carried out work contrary to the terms requested by the client or to the conditions of the licence issued by the municipality).[5]

In a number of cases, professional defendants will try to challenge and discuss the level of the relevant professional standard to demonstrate that his or her conduct meets the applicable professional standard. For this purpose, it is common to produce evidence through expert witnesses and experts on the applicable professional standard. In extremely technical disputes, lawyers and judges may be advised by technical advisers during examination and cross-examination of expert witnesses and experts.

From a practical point of view, one of the most significant difficulties that claimants face is proving that the conduct of a professional defendant should be considered a suitable or adequate cause of the relevant losses (causal link), especially in cases of negligence. The burden of proof as to the causal link rests with the claimant, regardless of whether tort or contractual liability is applicable, and the existence and extent of this burden was recently confirmed by the Supreme Court of Justice in a standardisation decision regarding the liability of financial brokers.[6] The causal link does not require proof that the damage concerned resulted directly from the specific negligent misconduct but, instead, only that a certain act was suitable or adequate to cause the damage.

A professional may have been negligent, but if this negligent conduct was not suitable or adequate to cause the losses borne by the claimant, then the claim should be dismissed.

Regarding professional negligence cases, some case law relates the causal link to the loss-of-opportunity theory.[7] This theory may reduce the practical difficulty of producing evidence regarding the causal link, but compensation should not correspond to the total loss borne by the claimant. In this case, the amount of compensation should be set according to the likelihood of success of the claimant in obtaining a certain profit or avoiding a specific loss, and in respect of which the claimant bears the burden of proof.[8]

Furthermore, professionals may enter into professional liability insurance policies and this type of insurance is actually mandatory for some professionals (for instance, lawyers, notaries, auditors, certified accountants, doctors, insurance intermediaries, gas assemblers and operators, real estate agents, port operators, real estate appraisers for property investment funds, credit intermediaries and credit or financial consultants services and travel agents).

### ii Limitation and prescription

Limitation periods for the commencement of professional liability claims depend on the nature or type of civil liability. If a professional liability claim is based on tort liability, the right to compensation generally expires after three years[9] and, in any event, no later than 20 years from the date of the misconduct.

In cases where the misconduct is considered a crime, the limitation period will be extended to that of the crime in question.

In the case of liability for breach of contract, the general limitation period applies, meaning that any claim to compensation becomes time-barred 20 years after the occurrence of the contractual breach.[10] Specific professionals or acts of misconduct may be subject to special rules on limitation periods, as described below.

The limitation period generally starts to run on the date on which the claimant becomes aware of his or her right to compensation, irrespective of whether he or she has knowledge

of the persons liable or the full extent of the damage incurred (which is usually the date that a claimant becomes aware that the requirements for civil liability have been met).

The running of the limitation period may be interrupted or suspended. The PCivC provides for several causes of interruption or suspension. For instance, the limitation period is interrupted by the judicial notification of a writ of summons or of any other act that, directly or indirectly, expresses the claimant's intention to enforce his or her right to compensation.

Interruption of the limitation period renders the time already elapsed without effect and restarts the applicable limitation period.[11] The new limitation period does not begin to run until a final decision is issued on the claims submitted to the court (*res judicata*), putting an end to the legal proceedings.[12]

In this context, it should be noted that the Supreme Court of Justice has considered that in cases where the misconduct is considered a crime, pending criminal proceedings are a continued cause of interruption of the limitation period, which will only start running again once the proceedings are closed.[13]

The PCivC also sets out several causes of suspension of the limitation period, such as the claimant being prevented from enforcing his or her right because of *force majeure*, during the final three months of that period, as well as the claimant not enforcing his or her right because of the fault of the liable party.[14]

Claims for damages based on expired rights become time-barred and this may be invoked as a defence in proceedings regarding professional liability.

### iii Dispute fora and resolution

Professional liability claims for damages are generally brought in first instance judicial courts with jurisdiction over civil matters.

The Portuguese Civil Procedure Code (PCPC) establishes the criteria for the competence of judicial (i.e., civil) courts.[15] When a claim is brought under the tort liability regime, jurisdiction usually lies where the relevant facts (e.g., the unlawful misconduct) took place.-[16] When a claim is related to the performance or breach of contractual obligations, either the court of the location where those obligations should have been performed or the court of the defendants' registered office or place of residence is competent.[17]

In certain circumstances, professional liability claims can also fall within the scope of jurisdiction of the administrative courts. This is generally the case for professional liability claims relating to medical practitioners exercising their duties as public health providers. In this case, professional liability claims fall within the jurisdiction of the court where the unlawful misconduct took place.[18]

Judicial proceedings are initiated by means of a filed written petition, in which the claimant must argue the material facts constituting the cause of action. Subsequently, the defendant must present his or her defence, either asserting that the facts alleged by the claimant are not true, that they do not produce the consequences claimed by the claimant or that the claimant's petition must be dismissed because of some other circumstance, such as a legal objection. The claimant and the defendant must file their requests for evidence along with their pleadings.

The pleadings phase is usually followed by a preliminary hearing in which procedural matters are discussed by the parties and decided upon by the judge. Witnesses and experts are examined at the trial hearing. Subsequently, the parties present their closing arguments and the court renders its decision. In litigation involving sums exceeding €5,000, the decision may be appealed to the court of appeal and cases exceeding €30,000 may be appealed from the court of appeal to the Supreme Court of Justice.

In cases where civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims generally have to be brought within the criminal proceedings and will be decided by the same court deciding the criminal issue. The claimant either files his or her damages claim within the deadline for submission of the indictment by the public prosecutor when the claimant is a party to the criminal proceedings or within 20 days of the claimant or the perpetrator being notified of the indictment. Subsequently, the defendant must present his or her defence. The pleadings phase is followed by the trial hearing and subsequent decision by the court. The above-mentioned rules on appeals also apply here.

When civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims can only be filed separately and in civil courts in limited circumstances.

Professional liability claims can also generally be submitted to arbitration.

### iv Remedies and loss

Under Portuguese law, the general principle is that compensation should place the injured party in the position that he or she would have been in but for the event causing the damage,[19] including for pecuniary and non-pecuniary or moral damage (restitution *in natura*).

Whenever this is not possible, does not fully repair the damage or is excessively costly, the injured party is entitled to claim the equivalent monetary compensation for all damage caused by the unlawful misconduct, including actual loss, loss of profit and future damage, if its occurrence can be predicted.[20]

Pursuant to Article 566 Section 2 of the PCivC, pecuniary compensation for damage should compensate the difference between the claimant's financial status 'at the most recent date that may be considered by the court' and the financial status he or she would be in were it not for the damage.

A claimant seeking compensation for damage is not required to specify the exact amount of the damage in the initial written petition and may formulate a generic claim in this respect when it is not possible to assess the full extent of the damage on the date the lawsuit is filed or if the claimant warrants that it is not possible to specify the exact amount of the compensation.[21] If, in the course of the proceedings, the claimant concludes that the existing damage is of an amount greater than previously claimed, he or she may review the claim accordingly. If it is not possible for the claimant to specify the exact amount of the damage in advance of the issuance of the decision, the costs can be quantified in a subsequent procedure.

In cases based on tort liability, the court may award compensation determined on grounds of equity for an amount lower than the amount of the existing damage when the

professional's liability, based on the degree of guilt, financial status of the parties and further circumstances, justifies this option.[22]

Compensation for non-pecuniary or moral damage may also be awarded. The amount of this compensation is determined on grounds of equity.[23]

Punitive damages are not provided for in Portuguese law,[24] but there is no cap on the amount of damages that can be awarded.

## Specific professions

### i Lawyers

The practice of the legal profession as a lawyer in Portugal is regulated by the statutes of the Portuguese Bar Association,[25] which state that lawyers must, inter alia, act with honesty, probity, uprightness, loyalty, courtesy, sincerity and independence.

The Portuguese Bar Association is the public professional association representing professionals who are practising lawyers acting in accordance with the Association's statutes. It regulates the profession and takes disciplinary action against lawyers and trainee lawyers.

To practise as a lawyer, it is necessary to be registered with the Portuguese Bar Association. The practice of law without registration is considered a crime of usurpation of functions under the Portuguese Penal Code and is punishable with a prison sentence of up to two years or a fine of up to 240 days.

Lawyers' liability is determined on the basis of their own disciplinary rules, and a breach of these may lead to the lawyer incurring disciplinary or administrative liability, depending on whether the breaches are ethical or administrative and regardless of how the profession is practised (i.e., whether in terms of an individual, professional association, in-house counsel or multidisciplinary association).

Lawyers' liability to clients is generally considered to be based on contractual liability, although it can be based on tort liability when it arises out of ethical breaches. In any case, it should be noted that, generally, the obligation assumed by a lawyer in relation to a client is only a best-endeavours obligation and not a results obligation, meaning that the lawyer assumes the obligation to use the most suitable means and knowledge in his or her power in conducting the client's matter in accordance with the law.[26] In other words, for a professional negligence claim to be successful, the claimant will have to demonstrate, inter alia, that the lawyers' conduct did not comply with the *lege artis* (best practice in the profession).[27]

Under the statutes of the Portuguese Bar Association, lawyers are mandatorily required to have professional liability insurance.

### ii Medical practitioners

The practice of medicinel is regulated by the statutes of the Portuguese Medical Association, approved by Law No. 282/77 of 5 July 1977, as amended.

The Portuguese Medical Association is a public professional association representing medical doctors in Portugal. To practise as a doctor, it is necessary to be registered with this body. The practice of medicine without registration is considered a crime of usurpation of functions under the Portuguese Penal Code. Professional misconduct by medical practitioners may also raise disciplinary issues (which are addressed by the relevant disciplinary body).

Medical professional liability proceedings may be brought under the rules of tort liability or contractual liability, depending on the public or private nature of the medical practice. In any case, similarly to lawyers, medical practitioners are not assumed to have a results obligation in relation to their patients but only a best-endeavours obligation. Nonetheless, medical practitioners undertake to use the most suitable means in their power in treating their patients in accordance with the advances of medical science. For a professional negligence claim to be successful against a medical practitioner, the claimant will have to demonstrate that the medical practitioner's conduct did not comply with the *lege artis*.

Medical practitioners in public hospitals and practices are generally subject to tort liability proceedings brought against them under Law No. 67/2007 of 31 December, which approved the Regime of Civil Liability of the State and Other Public Entities.

Under the Regime of Civil Liability of the State and Other Public Entities, state and other legal entities governed by public law are exclusively liable for damages arising from unlawful actions or omissions committed negligently by medical practitioners in the performance of their administrative duties and resulting from that performance. Medical practitioners are only liable when their acts or omissions are caused wilfully or when their diligence and care is significantly lower than that expected for the position they hold, with the public healthcare provider remaining jointly and severally liable. If the medical practitioners working for the healthcare institution act with the expected level of diligence and in accordance with the technical rules of medical science, they cannot be held liable, regardless of the outcome.

Medical practitioners in private healthcare providers are, in the absence of specific legislation, generally subject to the general rules of contractual liability set out in the PCivC, although the rules of tort liability may also apply.

Other medical practitioners such as dentists and nurses are all also regulated professions that require prior registration with a public association and are subject to the above-mentioned rules.

Private healthcare providers are required to enter into mandatory professional liability insurance policies. Although public healthcare providers are not required to do so, the Portuguese Medical Association currently offers professional liability insurance to all doctors validly registered with the Portuguese Medical Association.

### iii Banking and finance professionals

Liability of banking and finance professionals is currently governed by the RGICSF[28] and the Portuguese Securities Code, together with other specific regulations on these matters (for instance, Decree-Law No. 81-C/2017 of 7 July 2017 on the rules for credit intermediary activities and for providing credit consulting services) and, supplementarily,

by the general legal framework established in commercial and civil law (such as the Portuguese Companies Code and the PCivC).

Banking professionals (including directors, managers and employees) must act with scrupulous and thorough professional diligence, neutrality and loyalty.[29] Credit institutions must ensure that all their professionals comply with a high level of technical expertise.[30] The prudential assessment of the reputation of banking and finance directors is also guided by high standards for the expertise and skills required.[31] The above-mentioned Decree-Law No. 81-C/2017 sets similar rules on the duties of care of the professionals in these areas.[32] This Decree-Law also sets out the mandatory requirement for professional liability insurance for these professionals.

The Portuguese Securities Code contains several legal provisions on the high standard of the duty of care of finance professionals. The Portuguese Securities Code states that financial intermediaries and their professionals should act according to high standards of diligence, loyalty and transparency.[33]

Specifically with regard to the personal liability of banking and finance directors, the business judgement rule is applicable and, as mentioned above, exempts directors from liability. In this respect, the burden of proof of the relevant facts lies with the directors, as also mentioned above.

Unless the relevant misconduct is considered a crime, directors' professional liability is subject to a five-year time limitation from the date of the unlawful misconduct (or from the disclosure of the misconduct if it has been covered up) and the causing of damage, regardless of whether the full extent of the damage has already occurred (regarding the liability of directors towards the company itself, the limitation period does not start to run before the end of the term of office).[34]

Additionally, the Portuguese Securities Code contains several provisions on professional liability, such as the liability of specific professionals resulting from the preparation and approval of prospectuses,[35] investment advisers,[36] financial intermediaries and directors.[37]

Regarding the liability of professionals resulting from the preparation and approval of prospectuses (e.g., directors, supervisory board members, auditors and any professionals that have assessed or certified financial statements used in the prospectus), their conduct is also assessed with reference to a high standard of professional diligence and they are jointly and severally liable for damage caused by inaccurate or false content.[38] If liable professionals prove that the relevant damage was also caused by reasons other than the lack of information or forecasts contained in the prospectus, the amount of compensation will be reduced accordingly.[39] The right to compensation resulting from a breach of the rules applicable to the prospectus must be exercised within six months of the knowledge of the fault in the prospectus content, and expires, in any case, within two years of the end of the effective term of the prospectus or its disclosure or amendment, as applicable.[40]

Beyond contractual liability cases, the guilt of financial intermediaries is also presumed (and rebuttable) in pre-contractual liability disputes and also when information duties have been breached.[41] Except for fraud or serious misconduct, liability is subject to a two-year time limitation from the date on which the client becomes aware of the conclusion of the business transaction and its terms.[42] In the event of fraud or serious misconduct, a 20-year time limitation is applicable to contractual liability.[43]

Furthermore, investment advisory professionals,[44] real estate appraisers that render services for banking, insurance and finance institutions and pension funds[45] must enter into mandatory professional liability insurance policies.

Executive or remunerated directors appointed for companies that issue securities admitted to trading on a regulated market and companies that fulfil certain minimum requirements on business operations and number of employees must be secured by means of a proper security for an amount of at least €250,000. This security may be replaced by a directors' and officers' liability insurance policy.[46]

Similarly, financial entities that provide home banking and similar services should ensure they have in place appropriate information technology (IT) protection to prevent cyberattacks and damage to clients using these services. Otherwise, inadequate provision of IT protection in home banking and similar IT tools may trigger liability for the financial entities providing these services.[47]

Lastly, specific professional misconduct of banking and finance professionals may be considered an administrative infraction pursuant to the RGICSF, Portuguese Securities Code and other specific legal regulations, with the relevant proceedings being subject to the jurisdiction of the Bank of Portugal and the Portuguese Securities Market Commission (CMVM), as applicable. Administrative infractions may be punished, inter alia, by warnings, fines and ancillary sanctions; for example, a prohibition against providing banking and financial activities for a certain period (applicable to both companies and individuals). Administrative infractions are subject to specific time limitations.

### iv Computer and information technology professionals

There are no specific rules under Portuguese law governing the professional liability of computer and information technology professionals, thus the liability of these professionals is generally subject to the general rules of contractual liability set out in the PCivC.

Rules of tort liability may also apply when there is not a contract in place between the professional and the injured party (e.g., when there is an accidental disclosure of personal data of an individual who has not entered into a contract with the computer and information technology professional).

In this regard, while not specifically directed at computer and information technology professionals, the new General Data Protection Regulation (GDPR) (with effect from 25 May 2018) specifically provides for the right of any person who has suffered material or non-material damage as a result of an infringement of the GDPR to receive compensation from a data controller or processor.[48] Furthermore, Law No. 58/2019 of 8 August, which implements the GDPR in Portugal, provides for such a right to a compensation for damage suffered a result of an infringement of either this Law or the GDPR.

Without prejudice to the above, because of the significant number of cyberattacks during the pandemic, the approval and implementation of appropriate IT policies and protection against hacking, viruses, malware, spyware and ransomware, and correct training on the use of IT devices (including in teleworking scenarios) are deemed absolutely essential. If IT professionals fail to advise on the design and implementation of these policies and prevention mechanisms, they may be held liable.

Notably, in this context, insurance companies provide insurance policies to cover several types of damage resulting from cyberattacks (including ransomware attacks).

### v Real property surveyors

In Portugal, the taking up and pursuit of business by real property surveyors who render services for banking, insurance and finance institutions and pension funds is governed by specific rules defined by the CMVM and approved by Law No. 153/2015 of 14 September 2015.

These professionals are liable towards the contracting entity, its shareholders or participants in collective investment entities, banking clients, insurance policyholders, insured persons and beneficiaries of insurance contracts, and towards members, participants and beneficiaries of pensions funds for any damage arising from errors or omissions contained in evaluation reports attributable to them.[49]

Real property surveyors must take out mandatory professional liability insurance policies.

Lastly, real property surveyors are subject to the oversight and disciplinary action of the CMVM.

### vi Construction professionals

The execution of public works in Portugal is governed by Decree-Law No. 18/2008 of 29 January 2008, which enacted the Public Contracts Code, as amended. Construction works procured by private entities are governed by the PCivC.

Construction activities are governed by several legal instruments, such as: (1) Law No. 41/2015 of 9 January 2015, which establishes the framework applicable to the undertaking of construction activities; and (2) Decree-Law No. 555/99 of 16 December 1999 as amended, which sets out the legal framework for urbanisation and building.

The contractor may be liable to the party who commissioned the works or to the purchaser of a building for losses caused by and arising from: (1) the collapse of the building due to problems with the land or the construction; (2) repairs carried out or changes to the construction; (3) faults during the construction; or (4) defects in the building that appear within five years of completion of the works or any repairs. The collapse or defects in the construction must be notified to the contractor within one year of the date of the collapse or the defects becoming known, and any indemnity must be claimed within the subsequent year.

The liability of construction professionals can fall under contractual liability, for breach of the construction contract, as well as under tort liability, for breaching the rights of third parties.

Except for the limitation period of five years regarding claims for defects, the general limitation period of 20 years applies.

With respect to construction activities, only work accident insurance is mandatory, pursuant to Law No. 41/2015. Notwithstanding this, it is usual for parties who commission works to request the existence of a more comprehensive insurance policy.

Furthermore, Law No. 31/2009 of 3 July 2009 establishes the framework for technicians responsible for: coordinating, drafting and underwriting projects; inspection of public and private works; and management of such works. It is also mandatory for these technicians to take out professional liability insurance policies.

### vii Accountants and auditors

Regarding the performance of duties in connection to the public interest (for instance, audit companies and the issuance of relevant legal audit reports), auditors are liable towards audited companies and third parties in accordance with the terms and conditions set out in the Portuguese Companies Code and other relevant corporate legal provisions. Except for these services in connection to the public interest, auditors' liability for minor acts of negligent misconduct may be excluded under the terms and conditions set out in civil law (the exclusion of liability for gross negligent professional misconduct is void).[50]

Auditors should act independently and in accordance with best practice, in accordance with national and international auditing rules (including the International Standards on Auditing (ISA)) and maintain professional scepticism.[51]

Auditors are also bound to duties of disclosure and whistle-blowing resulting from their monitoring duties.[52] In the event of failure to comply with these duties, and where the general requirements on auditors' liability are met (e.g., serious or negligent misconduct), auditors will be held liable.

Auditors' liability towards audited companies falls under contractual liability for damage caused by their serious and negligent misconduct.[53] Regarding companies that are issuers of securities, Article 10 of the Portuguese Securities Code expressly states that auditors will be jointly and severally liable for shortcomings in their audit reports and opinions.

If an audited company proves that there were errors in audit proceedings (which would represent a contractual default), an auditor may rebut the legal presumption of his or her guilt by proving that he or she acted in accordance with best professional practice and auditing standards.[54]

Auditors will be liable towards creditors of audited companies for serious or negligent breaches of legal or contractual provisions intended to protect creditors only if corporate assets become insufficient to pay corporate debts as a result of this breach.[55] In this regard, the legal regime on directors' liability is applicable to auditors *mutatis mutandis*. Directors may be exempt from liability on the basis of proof of the application of the business judgement rule. However, this rule should be applicable to auditors on a mitigated basis because auditors are subject to technical and legal criteria rather than rational business logic. Nevertheless, it should be considered that auditing requires a wide scope of professional judgement in several cases without prejudice to criteria of best professional practice.[56]

In any case (professional liability in relation to audited companies, their creditors or third parties), auditors are not subject to strict liability. Therefore, auditors cannot be held liable for all failures (for instance, shortcomings in the financial statements) regardless of wilful or negligent misconduct.[57] Furthermore, it is common for auditors to argue that they were not provided with the relevant financial information during auditing proceedings.

Unless an act of misconduct is considered a crime, auditors' professional liability is subject to a five-year time limitation from the date of the unlawful misconduct, or from the disclosure of this misconduct if it has been covered up, and the causing of damage, regardless of whether or not the full extent of the damage has already occurred.[58]

Auditors may also be held liable for prospectuses according to the terms described above regarding finance professionals.

It is mandatory for auditors to take out professional liability insurance policies. Usually, these insurance policies are taken out through the Auditors Association.[59]

Lastly, professional misconduct by auditors may raise disciplinary issues (which are addressed by the Statutory Auditors Association) and may be considered administrative infractions that should be addressed in the scope of administrative infringement proceedings to be conducted, for instance, by the Supervising Authority for Insurance and Pension Funds (ASF), the Bank of Portugal or the CMVM, as applicable. Administrative infractions are subject to specific time limitations.

Accountants' professional duties and liability are governed by the statutes of the Chartered Accountants Association and, supplementarily, by Law No. 53/2015 of 11 June 2015 on the legal framework of professional corporations regulated by professional public associations and statutes of professional public associations.

Chartered accountants must act in accordance with best professional practice and independent criteria, and are subject to whistle-blowing obligations on public crimes and money laundering.[60] In the event of failure to comply with these duties, where general requirements on liability are met, chartered accountants will be held liable.

Whether chartered accountants render consultancy services when they undertake the obligation to prepare clients' financial statements is a controversial issue; in any case, it is undisputable that chartered accountants should prepare financial statements in the most favourable way to meet the client's needs.[61]

Finally, the professional misconduct of auditors may also raise disciplinary issues (which are addressed by the Chartered Accountants Association).

### viii Insurance professionals

Insurance activities in Portugal are regulated and insurance professionals are subject to the oversight of the ASF, the competent authority for the regulation and prudential and behavioural supervision of insurance, reinsurance, pension funds (and corresponding managing entities) and insurance and reinsurance intermediation activities.[62]

The pursuit of the insurance and reinsurance business is governed by Law No. 147/2015 of 9 September 2015, which implemented the Solvency II Directive, whereas insurance and reinsurance intermediation activities are mainly governed by Decree-Law No. 144/2006 of 31 July 2006 as amended (which implemented the Insurance Mediation Directive into Portuguese law).

It is mandatory for insurance and reinsurance intermediation professionals, such as intermediaries, agents and insurance brokers, to take out professional liability insurance policies.[63]

## Year in review

Since the application of a bank resolution measure to Banco Espírito Santo, SA by the Bank of Portugal in August 2014, professional liability cases in Portugal involving banking and finance professionals have been, and continue to be, a constant feature, largely prompted by biased media coverage.

Although a significant number of cases have already been dismissed because legal requirements were not properly met, or for lack of proof of unlawful conduct or evidence of the required causal link, several civil liability proceedings are still pending.

In addition, the 2008–2011 financial crisis and its subsequent impact on financial investment returns has led to an increase in the number of cases regarding the mis-selling of financial products and the professional liability of financial brokers (both individuals and financial institutions). While this topic of discussion, and litigation, is still relatively new, consistent case law is beginning to emerge indicating that the professional liability regime is not intended to compensate investors for unsuccessful investments.

Moreover, several cases of alleged medical negligence have recently been reported in the media and new rulings have since been issued, finding against medical professionals. In April 2023, an intern at Faro Hospital filed both disciplinary and criminal complaints against two of the unit's surgeons alleging wilful and negligent practices in 11 different cases since January 2023 (three of which resulted in the death of patients and the others in lasting harm). The case has received extensive media coverage, leading to the preventive suspension of the two surgeons by the Portuguese Medical Association. The matter is currently under investigation and disciplinary and criminal proceedings pending.

Portugal has also witnessed several high-profile cyberattacks recently, mostly since the pandemic, with targets ranging from newspapers to governmental entity websites. Furthermore, the number of these attacks has grown markedly since the beginning of the Russia–Ukraine conflict. According to data made available by the Public Prosecution Service, cyberattacks increased by 73.58 per cent from 2021 to 2022, with 2,124 cybercrime complaints made between 1 January and 31 December 2022, and these are certain to give rise to future litigation.

## Outlook and future developments

In light of the recent above-noted high-profile cyberattacks, and without prejudice to the liability of the hackers themselves, we expect to see an increase in litigation based on professional negligence stemming from inadequate IT policies and insufficient protection against hacking, viruses, malware, spyware and ransomware, as well as incorrect use of IT devices through lack of training. In this regard, insurance companies are already providing insurance policies to cover several types of damage resulting from cyberattacks (including ransomware attacks) and, in turn, these may also give rise to professional liability litigation regarding mis-selling of insurance policies.

Moreover, the covid-19 pandemic created new challenges for businesses, heightening the urgent need to digitise business operations and adapt to an operating model in which remote working has become the 'new normal'. Ultimately the significant increase

in businesses' reliance on IT systems to support remote working may reveal weaknesses in these systems. Indeed, where businesses have neglected cybersecurity risks or vulnerabilities in IT systems and verification procedures, leading to systems failures, backup and information losses or data breaches, and negative impacts on business operations overall, new litigation will certainly arise.

Equally, we expect the practical implications of remote working to have a corresponding impact on professional negligence cases, especially with regard to lawyers, medical practitioners, accountants and auditors, and banking and financial professionals, for whom face-to-face advice is still the norm.

Finally, as financial measures to mitigate the financial effects of the pandemic and the recent rise in inflation start to be rolled out to companies and families, a new wave of mis-selling claims can be expected, like those witnessed following the 2008–2011 financial crisis.

## Endnotes

1. Adriano Squilacce is a partner and Raquel Cardoso Nunes is an associate at Uría Menéndez – Proença de Carvalho. ^ Back to section

2. Article 483*et seq.* and Article 798 *et seq.*, respectively. ^ Back to section

3. Law No. 53/2015 of 11 June 2015 on the legal framework for traditional and multidisciplinary professional corporations regulated by professional public associations and the statutes of professional public associations, etc., and as recently amended by Law No. 12/2023. ^ Back to section

4. See the ruling issued by the Supreme Court of Justice on 7 February 2017, case No. 4444/03.8TBVIS.C1.S1, www.dgsi.pt (a different understanding was upheld in the ruling issued by the Supreme Court of Justice on 22 September 2011, case No. 674/2001.PL.S1, www.dgsi.pt). ^ Back to section

5. See the ruling issued by the Appeal Court of Lisbon on 8 May 2014, case No. 220040/11.OYIPRT.L1-8, www.dgsi.pt. ^ Back to section

6. See the ruling issued by the Supreme Court of Justice and published in the Portuguese Official Journal on 3 November 2022, case No. 1479/16.4T8LRA.C2.S1-A (standardisation decision No. 8/2022). ^ Back to section

**7** See the ruling issued by the Appeal Court of Coimbra on 7 November 2017, case No. 150/15.9T8OHP.C1, www.dgsi.pt: 'Having failed to appraise his client of a decision entirely unfavourable to the claims formulated in the action he was mandated to take to enforce them, thereby preventing the client from appealing (in the absence of which failing to comply with the statutory time limit laid down for that purpose thus allowing the decision to become final), thereby rendering it impossible to attack that decision nor have it reviewed by a higher court, the lawyer's omission is susceptible of giving rise to the separate harm of "loss of procedural chance" or loss of opportunity and, as such, subject to compensation.' See also the ruling issued by the Supreme Court of Justice on 10 September 2019, case No. 1052/16.7T8PVZ.P1.S1, www.dgsi.pt. ^ Back to section

**8** See the rulings issued by the Supreme Court of Justice on 5 June 2021, 19 December 2018, 2 November 2017 and 5 February 2013, case No. 34545/15.3T8LSB.L1.S2-A, case No. 1337/12.1TVPRT.P1.S1, case No. 23592/11.4T2SNT.L1.S1 and case No. 488/09.4TBESP.P1.S1, www.dgsi.pt. See also Orlando Guedes da Costa, *Responsabilidade Civil Profissional*, March 2017, Centro de Estudos Judiciários, p. 190 *et seq.* ^ Back to section

**9** Article 498 Section 1 PCivC. ^ Back to section

**10** Article 309 PCivC. ^ Back to section

**11** Article 326 Section 1 PCivC. ^ Back to section

**12** Article 327 Section 1 PCivC. ^ Back to section

**13** See ruling issued by the Portuguese Supreme Court on 22 May 2013, case No. 2024/05.2TBAGD.C1.C1, www.dgsi.pt. ^ Back to section

**14** Article 321 PCivC. In light of the public health emergency and to prevent and contain the spread of covid-19, limitation and expiration periods for all kinds of proceedings and procedures were suspended from 9 March 2020 to 2 June 2020, and again between 22 January 2021 and 5 April 2021. ^ Back to section

**15** Pursuant to the PCPC, Portuguese courts are deemed to be internationally competent when: (1) according to the applicable rules on territorial jurisdiction the claim may be filed in a Portuguese court; (2) the facts constituting the cause of action have taken place in Portugal; or (3) the claimant's rights may only be made effective by an action filed in Portuguese courts or initiating the lawsuit in a foreign country may impose significant difficulties for the claimant, provided there is a strong element of connection between the claim and the Portuguese legal system (Article 62 PCPC). Regulation (EU) 1215/2012 (the Recast Brussels Regulation) also applies to the issue of jurisdiction in claims brought against defendants who are domiciled in other EU Member States. ^ Back to section

**16** Article 71 Sections 1 and 2 PCPC. ^ Back to section

**17** Article 80 PCPC. Back to section

**18** Article 18 of the Portuguese Administrative Courts Procedure Code. Back to section

**19** Article 562 PCivC. Back to section

**20** Article 564 PCivC. Back to section

**21** Article 569 PCivC and Article 556 Section 1(b) PCPC. Back to section

**22** Article 494 PCivC. Back to section

**23** Article 496 PCivC. Back to section

**24** Ruling issued by Supreme Court of Justice on 25 February 2014, case No. 287/10.0TBMIR.S1, www.dgsi.pt. Back to section

**25** Approved by Law No. 145/2015 of 9 September 2015, as amended. Back to section

**26** Ruling issued by the Supreme Court of Justice on 10 September 2019, case No. 1052/16.7T8PVZ.P1.S1, www.dgsi.pt. Back to section

**27** See the ruling issued by the Appeal Court of Coimbra on 7 November 2017, case No. 150/15.9T8OHP.C1, www.dgsi.pt: 'In the execution of a mandate, a lawyer must put all his knowledge and commitment in the defence, in the interests of the client, although having a significant margin of freedom or technical autonomy. As a rule, the obligation to win the case is not included in the execution of a mandate, rather only the obligation to defend those interests diligently, according to the *lege artis*, with the aim of overcoming the dispute. Hence the obligation arising from the exercise of this activity is assumed as an obligation of means, not of result.' Back to section

**28** In late 2020, the Bank of Portugal submitted for public consultation a proposal for a Code of Banking Activity, which is intended to replace the RGICSF, with a view to systematising and updating the regulatory framework in light of the challenges faced by the national banking system. The public consultation closed in early 2021. However, to date, the proposal has not been submitted to Parliament. Back to section

**29** Articles 74 and 75 of the RGICSF. Back to section

**30** Article 73 RGICSF. Back to section

**31** Articles 30-D and 31 RGICSF. Back to section

**32** Articles 45 and 66. Back to section

**33** Articles 304 and 306-A of the Portuguese Securities Code. Back to section

**34** Article 174 of the Portuguese Companies Code and Article 318(d) PCivC. Back to section

**35** Article 149*et seq.* Back to section

**36** Article 301. Back to section

**37** Article 294-C, 304-A and 324. Back to section

**38** Articles 149 Section 2, 151 and 152 of the Portuguese Securities Code. Back to section

**39** Article 152 Section 2 of the Portuguese Securities Code. Back to section

**40** Article 153 of the Portuguese Securities Code. Back to section

**41** Article 304-B Section 2 of the Portuguese Securities Code. Back to section

**42** Article 324 Section 2 of the Portuguese Securities Code; see also the ruling issued by the Supreme Court of Justice on 17 March 2016, case No. 70/13.1TBSEI.C1.S1, and the ruling issued by the Appeal Court of Porto on 23 January 2020, www.dgsi.pt. Back to section

**43** See the ruling issued by Appeal Court of Guimarães on 29 January 2015, case No. 275/10.7TBPTB.G1, www.dgsi.pt. See also Gonçalo André Castilho dos Santos, *A Responsabilidade Civil do Intermediário Financeiro perante o Cliente*, CMVM – Estudos sobre o Mercado de Valores Mobiliários, Almedina, 2008, p. 256. Back to section

**44** Article 301 Section 39(c) and Section 4 of the Portuguese Securities Code. Back to section

**45** Law No. 153/2014 of 14 September 2014. Back to section

**46** Article 396 of the Portuguese Companies Code. Back to section

**47** See the ruling issued by the Court of Appeal of Guimarães on 9 June 2020, case No. 51/18.9T8PRG.G1. Back to section

**48** Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. Back to section

**49** Article 16 of Law No. 153/2015 of 14 September. Back to section

**50** Article 115 of the Statutes of the Statutory Auditors Association and Article 82 of the Portuguese Companies Code. Back to section

**51** Articles 61 and 70 of the Statutes of the Statutory Auditors Association and ISA 200 on the overall objectives of the independent auditor and the conduct of an audit in accordance with the ISA. ^ Back to section

**52** Article 304-C of the Portuguese Securities Code, Article 420-A of the Portuguese Companies Code, Article 79 of the Statutory Auditors Association and Articles 4 Section 1(e), 11 Section 1(c) and 43*et seq.* of the Law on the Prevention of Money Laundering and Terrorist Financing. ^ Back to section

**53** Article 82 Section 1 of the Portuguese Companies Code. ^ Back to section

**54** Gabriela Figueiredo Dias,*Fiscalização de Sociedades e Responsabilidade Civil-* , Coimbra, 2006, pp. 93–94. ^ Back to section

**55** Articles 78 and 82 Section 1 of the Portuguese Companies Code. ^ Back to section

**56** Gabriela Figueiredo Dias,*Fiscalização de Sociedades e Responsabilidade Civil-* , Coimbra, 2006, pp. 70–73, and Tiago João Estêvão Marques, *Responsabilidade Civil dos Membros de Órgãos de Fiscalização das Sociedades Anónimas*, Almedina, 2009, pp. 173–176). ^ Back to section

**57** Gabriela Figueiredo Dias,*Fiscalização de Sociedades e Responsabilidade Civil-* , Coimbra, 2006, p. 57, and Ezagüy Martins, 'A Responsabilidade Civil dos Revisores Oficiais de Contas e dos Técnicos Oficiais de Contas', *Responsabilidade Civil Profissional*, March 2017, Centro de Estudos Judiciários, p. 223. ^ Back to section

**58** Article 174 of the Portuguese Companies Code. ^ Back to section

**59** Article 87 of the statutes of the Statutory Auditors Association and Article 10 of the Portuguese Securities Code. ^ Back to section

**60** Articles 70, 76 and 121 of the Statutes of the Chartered Accountants Association; Articles 2–4 of the Code of Ethics; and Articles 4 Section 1(e), 11 Section 1(c) and 43*et seq.* of the Law on the Prevention of Money Laundering and Terrorist Financing. ^ Back to section

**61** See the ruling issued by the Supreme Court of Justice on 10 July 2012, case No. 5245/07.0TVLSB.L1.S1, and the ruling issued by the Supreme Court of Justice on 26 April 2012, case No. 417/09.5TBVNo. L1.S1, www.dgsi.pt. ^ Back to section

**62** The CMVM also has some supervisory powers in respect of rules of conduct relating to unit-linked life insurance products and transactions. ^ Back to section

**63** Decree-Law No. 144/2006 of 31 July 2006. ^ Back to section

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# Switzerland

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## Summary

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# Introduction

## i Legal framework

Swiss law distinguishes between contractual and extra-contractual liability. The statutory provisions are mainly to be found in the Swiss Civil Code (CC) and the Swiss Code of Obligations (CO).

It is possible for damage to be caused cumulatively by a violation of contractual duties and through extra-contractual negligence. However, indemnification for the same damage can be obtained only once. The claim is exhausted once it has been satisfied, irrespective of the legal basis.[2]

The focus of the present analysis is on professional negligence and the resulting liability. Therefore, it deals mainly with contractual liability. The legal basis for contractual liability is Article 97 of the CO. Legal literature and case law supplement the main contractual duties by adding several ancillary duties. These ancillary duties mainly focus on diligence, care and reporting requirements. A violation of any of these duties can result in contractual liability.

In Switzerland, a service provider is primarily considered to be an agent of the service provider's client. To the extent that the law does not provide for specific duties in relation to specific services, the general duties of care and diligence are therefore governed by agency law.

In performing its duties, the agent is required to act in the interest of the principal in achieving the desired results.[3]

Despite the general principle of freedom of contract, agency law contains a number of mandatory provisions. Based on the jurisprudence of the Swiss Federal Supreme Court, the principal duties of care and loyalty[4] are mandatory and cannot be waived by contract.-[5]

Article 398 Paragraph 2 of the CO provides that the agent owes the principal the loyal and careful performance of the mandate.

The duty of loyalty encompasses the safeguarding of the principal's interest and the performance of all acts necessary to achieve the purposes of the mandate. The agent is required to refrain from acts that could cause the principal damage. The duty of loyalty encompasses duties of care, reporting, discretion and confidentiality.

A violation of the duty of loyalty can also constitute a violation of provisions of penal law such as embezzlement under Article 138 of the Penal Code (PC) or criminal mismanagement under Article 158 of the PC. The duty of care is considered to further specify the duty of loyalty. However, with the exception of the reference to the duty of care of the employee in employment law,[6] the duty of care is not explicitly referred to in statutory law, and its scope has been defined by the jurisprudence of the Federal Supreme Court. The duty of care includes the purposeful and success-orientated performance of duties. The threshold of negligence is defined objectively by the average professional care exercised in the industry in question.[7] The level of care is also defined by the level of

knowledge and skills of a specific agent that the principal knew or should have been aware of.[8]

According to the long-standing jurisprudence of the Federal Supreme Court, the agent cannot be held liable for a lack of success. Liability can only be incurred by a lack of care or disloyal conduct leading to damage. Objective criteria are applied. The level is higher for professional agents who are paid for their services. Standards and practices applicable to specific professions are also relevant.[9] Finally, the specific circumstances of the case in question must be taken into account.

Over time, the jurisprudence of the courts has defined rules of conduct that have become the benchmark for the level of care in certain professions.[10] In many areas, the duties of care have, therefore, become standardised.

A claim for negligence is in most cases asserted based on Article 97 Paragraph 1 of the CO in connection with Article 398 Paragraph 2 of the CO. Three fundamental elements are of relevance. The first element is a violation of contractual duties, specifically negligence in performing the duties. The second element is that damage has been suffered, and the third element is a natural and adequate causal connection between the violation of duties and the damage that occurred. Culpability is another required element of contractual liability, but, in contrast to the other elements, it is assumed if the other three elements can be affirmed. The agent can, however, avoid liability by exculpating himself or herself by proving that he or she has not acted negligently.

### ii Limitation and prescription

Under Swiss law, limitation does not affect the existence of the claim but, rather, bears on the legal possibility of asserting the claim.[11] Therefore, the debtor can avoid liability by asserting the exception or prescription. If the debtor raises this exception, the court is required to determine whether the legal requirements are fulfilled and, if so, dismiss the claim on its merits. In the event that the debtor does not assert the exception, the court has no authority to itself determine whether the claim is time-barred or not.[12] Swiss law distinguishes between prescription and forfeiture. Whereas prescription only affects the enforceability of a claim, forfeiture results in the extinction of the claim. Therefore, the court is required to determine *ex officio* whether a claim has been forfeited by the lapse of time. Moreover, contrary to limitation, forfeiture cannot be stayed or interrupted.

Depending on the cause of action, Swiss law provides for various statutes of limitation. According to Article 127 of the CO, the general rule is that, in the absence of specific legal provision to the contrary, contractual claims become time-barred after 10 years.[13] Certain claims – for example, claims for legal fees and fees for medical treatment – become time-barred after five years.[14] One exception to these general principles is provided for in Article 128a of the CO, according to which contractual claims based on personal injury or death generally become time-barred after three years from the date on which the claimant became aware of the damages and, at the latest, 20 years after the violation of the contract. The general rule for claims in tort is that they become time-barred three years after the damage occurred and the identity of the person that caused the damage became known. This 'relative' statute of limitations is provided for in Article 60 Paragraph 1 of the CO. Irrespective of the relative statute of limitations, claims in tort become time-barred 10 years after the act that triggered liability. One exception to these general principles again applies

to claims based on personal injury or death. Article 60 Paragraph 1 *bis* provides that such claims in tort become time-barred three years after the claimant becomes aware of the identity of the tortfeasor and, at the latest, 20 years after the illegal act. Another exception is provided for in Article 60 Paragraph 2 of the CO, whereby a claim based on a criminal offence with a longer prescription period than the civil law statute of limitations becomes time-barred only after the prescription period for the prosecution of the criminal offence has lapsed.

The law provides for the possibility of interrupting the statute of limitations under specific circumstances. If the statute of limitation is interrupted, a new limitation period of the same length is triggered.[15] According to Article 135 of the CO, the statute of limitations is interrupted by: (1) the acknowledgement of the debt; (2) debt collection proceedings; (3) the initiation of formal conciliatory proceedings; (4) the filing of a claim in court or in arbitration proceedings; and (5) a declaration of insolvency. The parties can also agree to interrupt the statute of limitations when entering settlement proceedings. Moreover, a party can waive its right to invoke the statute of limitations. It can, however, only do so after the limitation period starts. According to the new Article 141 Paragraph 1 *bis* of the CO, which entered into force on 1 January 2020, the waiver is required to be made in writing.

The commencement of formal conciliatory proceedings, an action in court or arbitration proceedings also prevent the forfeiture of a claim.

### iii Dispute fora and resolution

In Switzerland, civil procedure is governed by the Federal Civil Procedure Code (CPC) and, with respect to the procedure before the Federal Supreme Court, the Supreme Court Law.

Whereas civil procedure is governed by federal law, the organisation of the courts of first instance and the courts of appeal are governed by cantonal law.[16] The competence of the cantonal courts and the determination of the type of procedure is generally predicated on the amount in dispute.

In the absence of statutory provisions to the contrary, the ordinary (general) procedure before the court of first instance applies if the amount in dispute exceeds 30,000 Swiss francs. A simplified procedure applies to claims of no more than 30,000 francs.[17]

Certain cantons of particular importance for the Swiss economy, such as Zurich, have specialised commercial courts. These commercial courts deal with commercial litigation between corporate entities. Individuals acting as plaintiffs can chose between the commercial court and the district court if the respondent is a commercial entity. The commercial court acts as the sole cantonal instance in commercial disputes. The panel of judges includes professionals with experience in the commercial area the dispute focuses on. The panel of judges hearing an insurance-related dispute will, therefore, include industry experts who are frequently professionals from the insurance industry and act as part-time judges.

The district courts are the courts of first instance for all disputes except those brought before the commercial courts. Prior to filing the claim with the district court (but not before the commercial court), the claimant is required to file a request for conciliation with the justice of the peace. The role of the justice of the peace is similar to the role of a mediator. Although minor disputes between private individuals can frequently be resolved in this

manner, thereby avoiding an action in court, the conciliatory hearing is mostly a purely formal hoop to jump through in cases in which the parties have already retained counsel and an attempt to settle the case out of court has failed. According to Article 199 of the CPC, the parties can mutually agree to go directly to court if the amount in dispute exceeds 100,000 francs. The claimant can also unilaterally decide to directly file its claim in court if the respondent is domiciled abroad or if its domicile is not known.

The cantonal superior court is the court that hears appeals against the decisions of the district courts. The judgments of the cantonal superior courts are then subject to an appeal to the Federal Supreme Court if the amount in dispute exceeds 30,000 francs.[18]

### iv Remedies and loss

Depending on the circumstances, the principal can assert claims for: (1) performance; (2) damages; (3) reporting; (4) disgorgement of profit; and (5) fee reduction.

If the agent is in default with the performance of his or her duties, the principal has the right to assert a claim cumulatively for performance and damages resulting from the delay.

The principal can also, in the event of a default, rescind the contract and claim damages.[19] In general, both the agent and the principal by law have the right by law to terminate at any time the agency relationship.[20] According to legal literature and the jurisprudence of the Federal Supreme Court, an agency relationship is always based on mutual trust. Therefore, neither the agent nor the principal can be expected to continue to perform their duties if the trust between the parties has – for whatever reason – been lost.[21]

The right of termination by the agent does not apply if, because of the specific circumstances, termination would be untimely. An example would be a lawyer terminating the client relationship at a time at which the client can no longer properly instruct a replacement to meet a legal deadline. If the principal is, under such circumstances, forced to terminate the agency relationship because of the negligence of the agent, the agent may also be liable for damage caused because of the termination of the legal relationship as such.[22]

In addition to his or her claim for performance and damages, the principal can assert his or her right pursuant to Article 400 of the CO to require the agent to report to the principal. The principal can also demand that the agent disgorge everything he or she has received from the principal or from third parties in the context of the performance of his or her duties. The agent is required to surrender not only valuables but also documents and other data carriers.[23]

If the agent was negligent in performing his or her duties, the principal has the right to reduce the fees payable to the agent. The principal is, however, required to pay fees to the extent that the agent properly performed his or her duties for the benefit of the principal. In the event that the work product is, because of the negligence of the agent, without any value to the principal, the agent forfeits the entire fee.[24]

According to the jurisprudence of the Federal Supreme Court, damage is defined as an involuntary reduction of net assets. Damage can, therefore, be a reduction of assets as such or an increase in liabilities. Damages can also include a loss of profits. The Federal Supreme Court applies the general formula that damages can be calculated by comparing the current financial situation with the financial situation as it would have been without the

breach of duties.[25] There are two methods for determining the hypothetical value of the net assets. The first method is to compare the current net asset value with the net asset value that would have resulted if the agent had properly performed his or her duties under the contract. The alternative is a comparison between the current net asset value and the hypothetical net asset value if the contract had not been concluded at all.

The general rule for determining damages in the case of agency agreements is the former method (comparison between current net asset value and net asset value in the case of proper performance).[26] This can pose difficulties in determining the hypothetical net asset value resulting from correct performance.[27] The second method can be applied if the professional service provider should, under normal circumstances, have known that it would not be possible to fulfil the contract correctly. If the service provider in this case did not make the principal aware of this when accepting the mandate, the principal has the right to be made whole again.

## Specific professions

### i Lawyers

The basis of the relationship between a lawyer and his or her client is an agency agreement. The principal duty of the lawyer in accordance with Article 394 Paragraph 1 of the CO is to fulfil the duties provided for in his or her contract with the client. This must be understood in a very broad sense. In general, the client primarily requires advice to determine what legal options are available. Although this practice is slowly changing, Swiss lawyers do not as a rule define their task in a detailed engagement letter. In general, the mandate agreement simply identifies the counterparty and defines the task of the lawyer in very short terms (for example, 'claims in tort' or 'claims out of professional negligence').

Although the mandate agreement could in theory define the scope of the duty of care, this is rarely the case in practice. The duty of care is defined by what can reasonably be expected of a legal professional with average skills. The Federal Law on Conduct within the Legal Profession (BGFA) simply states that the lawyer is required to provide services to the principal dutifully and carefully.[28]

However, in complex cases requiring specialist knowledge, the lawyer is required to inform the potential client and refuse to accept the mandate if he or she does not have this specialist knowledge. A general practitioner can, therefore, be held liable if he or she accepts a mandate that requires knowledge of an area of law of which he or she has little or no experience and this results in damage to the principal.

In addition to the general duty of care, the lawyer has several duties relating to different phases in the execution of his or her mandate. When accepting the mandate, the lawyer has to verify that there are no conflicts of interest and that he or she can exercise the mandate independently. In the second phase, he or she is required to obtain the instructions needed to perform his or her duties properly. This task is frequently underestimated. Clients have a different perception of what is relevant and the lawyer is required to pose questions and obtain the information that he or she requires to conduct a proper legal analysis. The third phase is the legal analysis itself, based on the instructions the lawyer has received from

the client. The lawyer is required to know the law and have access to the legal literature and precedents that are necessary to perform the analysis properly. The lawyer is then required to report properly to the client and make the client aware of possible risks. In disputes, the lawyer is required to conduct the litigation in accordance with the applicable procedural rules, in particular to observe deadlines and to react in the appropriate manner to procedural steps undertaken by the counterparty. If, during the course of performing his or her duties, the lawyer comes to the conclusion that specialist knowledge is required, he or she must inform the client and engage a specialist – possibly as a subcontractor. Agency law is governed by the principle that the agent is required to perform personally the task agreed upon. Therefore, lawyers and other agents as a rule specifically include a provision in their contracts that allow for the engagement of a subcontractor. A lawyer needs to comply with a high standard of care.[29] He is also responsible for the conduct of subcontractors he has engaged.

However, a lawyer does not undertake to be successful in achieving the results that the client desires. The client must accept the risk that the lawyer, despite exercising due care, will not be successful.

In practice, the negligence for which lawyers are most frequently held liable in Switzerland is a violation of the duty of care. Missing a statutory or court-ordered deadline is considered a violation of the duty of care almost irrespective of the reason.[30] The same applies with respect to claims becoming time-barred after the lawyer has accepted the mandate. Other procedural mistakes with irreversible consequences also give the lawyer little room to exculpate himself or herself. On the other hand, it is extremely difficult in Switzerland to successfully assert liability claims based on the – possibly wrong – assessment of the law in litigation. In most areas of civil law, including agency law, it is the judge who is required to correctly apply the law (*iura novit curia*). Therefore, although it can certainly be embarrassing for a lawyer to make fundamental mistakes in arguing substantive law, the judge is required to correct these mistakes. Litigation is not an exact science and lawyers are often forced to make tactical and strategical decisions as to how to present the case in court. Therefore, what has been said concerning the correct application of the law also applies, to a lesser extent, to the manner in which the facts are presented to the court. Liability can successfully be asserted in such cases, but it is certainly more difficult to do so than if the lawyer had committed a procedural error. The above applies to dispute resolution in court or before other authorities. The risk of becoming liable for malpractice because of the incorrect application of the law in contractual or corporate work is higher, as mistakes of this kind are generally easier to prove.

Lawyers licensed to practise in Switzerland are required to maintain professional liability insurance with minimum coverage of 1 million francs.[31] In practice, large law firms have substantially higher coverage. Professional liability insurance is governed by the Federal Law on the Insurance Contract. The client cannot assert a claim directly against the insurer but, rather, must claim against the lawyer. There is, therefore, a risk that the client will not be covered for loss if the insurance company can successfully assert an exception to coverage, in particular the belated notification of the claim to the insurance company.

### ii Medical practitioners

With respect to medical practitioners, it is important to distinguish between doctors in private practice (including doctors who work for private clinics) and medical practitioners

who work for public institutions such as the cantonal or regional hospitals. The legal relationship between a private practitioner and the patient is qualified as an agency agreement in accordance with Article 394 *et seq.* of the CO, whereas the relationship between public medical practitioners (in hospitals in particular) and their patients are governed by cantonal public law. Therefore, the basic principles applicable to agents also apply to medical practitioners in the private sector, whereas the applicable cantonal law on the liability of public institutions applies to public institutions and their employees.

Specific provisions concerning medical practitioners can be found in the Federal Law on Medical Practitioners (LMG). Moreover, professional regulations and guidelines, such as the Rules of the Swiss Association of Doctors, apply. These rules and regulations more closely define the rules of conduct set out in the LMG, and also set out ethical principles.

The primary duty according to Article 40 of the LMG is to exercise due care in the interests of the patient. In practice, the courts obtain expert opinions when dealing with a specific malpractice case. The Federal Supreme Court has held that doctors are required to exercise due care even when treating patients outside their practice or hospital either as a favour or in the case of an emergency.[32]

The required degree of care is determined based primarily on objective criteria. The standard of care is higher for specialists practising in their area of specialisation. The circumstances of the specific case play a role in correctly applying both the objective and the subjective criteria in question. In particular, the nature of the treatment or the operation, the risks generally associated with this treatment or operation, the timely urgency and the available infrastructure are of the essence.[33] Therefore, although in general a hospital or a doctor incurs liability for any violation of care, the test applied in emergency situations or where a fully reliable diagnosis is not possible because of the nature of the disease or injury is less strict.[34]

The duty to correctly and completely inform the patient of the risk of a treatment is of fundamental importance. According to the Federal Supreme Court, an operation qualifies as a bodily injury. With the exception of emergencies, the consent of the patient is therefore required.[35] This consent can only be given based on a correct disclosure of the benefits, risks and possible alternative treatments.[36] The agent's duty to account for his or her activities[37] is also of relevance.

If the patient is not given all necessary explanations before the treatment, the medical practitioner can become liable irrespective of whether he or she then exercised due care in treating the patient. In this case, the medical practitioner can only exculpate himself or herself if he or she can prove that the patient would have consented to the treatment even if he or she had been given all necessary explanations (hypothetical consent).[38]

As is the case for lawyers, doctors are also required to obtain insurance coverage for errors and omissions.

### iii Banking and finance professionals

Financial services are again, in general, governed by agency law. However, the financial industry is highly regulated and a great number of laws also apply (the Federal Law on Banks and Savings Banks, the Anti-Money Laundering Law and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading

to name only a few). Further legislation applicable to the provision of financial services adopted by Parliament in spring 2018 (namely the Swiss Financial Services Act and the Swiss Financial Institutions Act) entered into force as of 1 January 2020. Generally speaking, the rules governing the industry are being aligned to those in the European Union and constantly becoming stricter and more detailed.

For the time being, in providing investment advisory, securities trading and assets management services, the service provider is primarily required to observe the general duties of care and loyalty as provided for in agency law. The applicable benchmark is the degree of care that can objectively be expected of a conscientious and diligent agent, and it is set high in the financial industry. To a certain degree, the knowledge of the client is also of relevance. Although this does not diminish the agent's duty of care, a client who is engaged in the financial industry himself or herself, or otherwise has experience with investments, will find it more difficult to hold an investment adviser or portfolio manager liable. Rules of conduct and the general practice when providing the financial services in question are also of relevance. A great degree of standardised duties of care have developed over time, starting with the Swiss Bankers Association Due Diligence Code of Conduct first implemented in 1977 and continuously revised until present. Further statutory and regulatory rules apply in particular to investment advice and portfolio management. The increased risks associated with cybercrime have also led to a very high standard for the duty of care – in particular in the context of e-banking.

The duty of a full and detailed risk disclosure and stringent rules concerning the identification of customers and beneficial owners play a significant role. The violation of these duties not only is associated with a liability for damages but can also have penal and administrative law consequences. A violation of the duty of due care can be qualified as criminal mismanagement according to Article 158 of the PC. Sanctions are also imposed for violations of the duties to ascertain the identity of the beneficial owner and the source of the funds. The Federal Supreme Court has held that the probability of causing damage and the grievousness of the lack of care are the two elements to be considered from the point of view of penal law.[39] The Swiss regulator can impose financial (disgorgement of ill-gotten gains) and other sanctions on financial service providers who have not exercised due care. In grievous cases, the regulator can revoke licences to provide financial services and ban individuals responsible for serious violations of supervisory law from acting in a senior function at a supervised institution for up to five years.

### iv Computer and information technology professionals

Other than in the legal, medical and financial sectors, no specific rules apply to services in the information technology sector. These professions are not regulated in Switzerland. The general rules applicable to agents set out in the introductory section therefore apply.

### v Real property surveyors

A private association of Swiss real estate appraisers, SIV, exists, but this association does not publish rules that are binding for either its members or the profession in general. Again, the general considerations set out in the introductory section apply.

### vi Construction professionals

Although not regulated by state authorities, the Swiss Association of Engineers and Architects (SIA) publishes very detailed rules, which can be considered the standard in the industry.

It is often difficult to determine whether the contract with architects and engineers is an agency agreement or a works contract. With respect to the level of loyalty and care, however, the distinction is not relevant. They are equivalent. The SIA Rules 102 and 103 of 2020 provide for a general duty of due care, which is then further specified in various respects. The engineer is, according to Article 1.2.1 of the SIA Rules 102 and 103, required to apply the current art of construction as well as generally accepted current rules of building and construction.[40] An architect is further, in accordance with Article 2.1 and 3.4.1 of the SIA Rules 102 and Article 4.2 of the SIA Rules 103, required to give the customer proper advice. If he or she received instructions that are impractical or dangerous, he or she is required to warn the customer. If the customer is a professional and knowledgeable of the practices in the construction industry, the architect or engineer has a lesser responsibility in this respect. The Federal Supreme Court has held that an architect can also become liable for mistakes made in the calculation of costs.[41]

The liability of engineers and architects is governed by Article 97 Paragraph 1 of the CO combined with Article 398 Paragraph 2 of the CO (on agency), and Article 364/368 Paragraph 1 of the CO (on works contracts).

In general, architects and engineers voluntarily take out professional liability insurance. It is advisable to ascertain that such insurance exists when choosing a planner or an architect.

### vii Accountants and auditors

Accountants are agents in accordance with Article 394 *et seq.* of the CO. In this respect, the general rules set out in the introductory section above apply. As in the area of construction, most accountants are members of a private association. However, the degree of private law regulation is not comparable with the construction industry. The Federal Supreme Court has held that accountants are liable for an exact and complete accounting.[42]

Auditors are more strictly regulated by the Federal Law on the Admission and Supervision of Auditors. Special rules apply to the auditors of financial institutions. A special regulatory authority exists.

In addition to the general provisions of agency law, the liability of auditors is governed by Article 755 of the CO, a provision in the section of the CO dealing with corporate law. The auditor is liable for all damage caused intentionally or negligently.[43] An objective standard applies. The auditor is required to be capable of properly analysing financial statements with respect to their accuracy and adequacy. He or she is required to carefully prepare an accurate audit report. Special duties apply in particular to the auditors of financial institutions, which are required to inform the financial regulator (FINMA) of violations of regulatory and legal duties by the audited financial institutions.

The duty of the auditor to notify the judge in cases of insolvency is of particular importance in the context of liability. A failure to do so can result in the liability of the auditor for damages resulting from a further deterioration of the financial situation following the audit. In this respect, the auditor is also required to ensure that the audit report is prepared and submitted to the shareholders in a timely manner. According to Article 699 Paragraph 2 of

the CO, the annual general assembly, which is required to approve the financial statements based on the audit report, must take place within six months of the end of the business year. If the board of the directors does not comply with its duty to convene the general assembly in a timely manner, the auditors are authorised and required to themselves convene the general assembly. The failure to do so can again lead to the liability of the auditors.

Professional liability insurance is the standard in the industry. Regulated auditors are legally required to be insured.[44]

### viii Insurance professionals

Insurance companies are considered to be a part of the Swiss financial industry and are strongly regulated. The legal basis is the Federal Law on the Supervision of Insurance Companies and the regulator is FINMA. To a great extent, reference can be made to Section II.iii concerning financial service providers. The duty of care is high.

Professional liability insurance is mandatory.

## Year in review

There have been no substantial legislative developments in the area of professional negligence in 2021. A very substantial claim in the context of the insolvency of a financial institution is currently being asserted by its clients as a derivative action against a major audit firm. This case is likely to go up to the Federal Supreme Court ultimately, and result in a published judgment that could serve as a precedent for future actions against auditors. At present, it is not yet possible to disclose further details.

## Outlook and future developments

The Federal Supreme Court has tended to impose higher standards of care and also to standardise the requirements for certain industries over the past years and is expected to continue to do so.[45] Also, professionals in various industries have increasingly been organising themselves in professional associations. These will further develop professional standards that can become the standard in their respective industries and, therefore, a benchmark that will be taken into account by the courts. In general, it is to be expected that the standard of care within the service industry will continue to become stricter over the coming years.

Endnotes

1 Philipp Känzig and Jonas Stüssi are partners at Staiger Attorneys at Law Ltd. ^ Back to section

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**3** Article 394 Paragraph 1 CO. Back to section

**4** Article 398 CO. Back to section

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**10** Fellmann, 2016, page 98 f. Back to section

**11** Huguenin, Paragraph 2220; Fellmann and Kottmann, Paragraph 3027. Back to section

**12** Article 142 CO. Back to section

**13** Article 127 CO. Back to section

**14** Article 128 No. 3 CO. Back to section

**15** Article 137 Paragraph 1 CO. Back to section

**16** Article 122 Paragraph 2 of the Swiss Constitution and Article 3 CPC. Back to section

**17** Article 243*et seq.* CPC. Back to section

**18** Article 74 Paragraph 1 of the Supreme Court Law. Back to section

**19** Article 107*et seq.* CO. Back to section

**20** Article 404 Paragraph 1 CO. Back to section

**21** Federal Supreme Court decision 115 II 464 No. 2a. Back to section

**22** Federal Supreme Court decision 110 II 380 No. 3. Back to section

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**24** Federal Supreme Court decision 124 III 423, Pra 88 (1999) No. 22. ^ Back to section

**25** Federal Supreme Court decision 104 II 198 No. a; Federal Supreme Court decision 127 II 403 No. 4a; Fellmann,Walter: Attorneys at Law (Second Edition, Berne 2017), Paragraph 1458. ^ Back to section

**26** Article 97 CO in connection with Article 398 Paragraph 2 CO. ^ Back to section

**27** Fellmann, 2017, Paragraph 1458 f. ^ Back to section

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**30** Federal Supreme Court decision 87 II 364. ^ Back to section

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**32** Federal Supreme Court decision 115 Ib 175 No. 2b; Landolt, Hardy and Herzog-Zwitter, Iris: 'Physicians' duty of care', HAVE, 2016, page 112. ^ Back to section

**33** Federal Supreme Court decision 133 III 121 No. 3.1; Huguenin, Paragraph 3268; Landolt and Herzog-Zwitter, page 112. ^ Back to section

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## Summary

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**SPECIFIC PROFESSIONS**
**YEAR IN REVIEW**
**OUTLOOK AND FUTURE DEVELOPMENTS**
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# Introduction

## i Legal framework

The core obligation of a professional is to provide services to the client with reasonable care and skill. A term to this effect is implied by statute[2] in the contract of the retainer and usually arises concurrently in tort. A professional is rarely taken to have warranted to the client that any particular outcome will be achieved.

The scope of the professional's duty of care is determined by a combination of the terms and purpose of the retainer, the client's instructions and sometimes the relevant professional regulatory and legal context. The performance of the duty of care is usually judged by reference to 'the standard of the ordinary skilled man exercising and professing to have that special skill'.[3] In some cases, the court will depart from that standard if it imposes unacceptable risk or is illogical.

Increasingly, the issue of liability may be determined by reference to the quality of risk advice given by the professional. In some cases, the courts have adopted nuanced and complex tests for assessing whether the client was properly informed of material risks.[4] Another strand of case law allows for the professional to be found liable despite being correct about a matter of interpretation if the court considers that he or she should have warned the client that others could take a different view.[5]

The role of professional regulation may also be significant in some circumstances: codes of conduct may be asserted as the distillation of good practice or even giving rise to an actionable duty. Many regulatory schemes also mandate a framework for client redress and compensation that exists alongside the court jurisdiction. These tend to adopt lower criteria for proof and are usually cost-free to the client.[6] They tend to be used for single low-value claims, but the regulator may also have powers to require the professional to carry out a past business review to identify all clients who have suffered harm and provide redress to them. The exercise of such powers may greatly increase the professional's liability exposure.

In addition to a failure to discharge the duty of care, a professional may also be found liable on other grounds (e.g., for breach of warranty of authority, for breach of trust when safeguarding client funds, and for breach of fiduciary obligations of loyalty and of acting in good faith in the best interests of the client). These routes to liability may involve the court in adopting different approaches to causation and quantification of loss (see below).

## ii Limitation and prescription

The limitation period that is most commonly engaged in professional negligence disputes is the six-year period for causes of action in contract and tort. This arises under Sections 2 and 5 of the Limitation Act 1980. The six-year period starts on the date that the cause of action accrues. In contract, it is usually straightforward to establish the date of the accrual; it will be when the defendant's breach of contract occurs irrespective of when damage is sustained. In tort, the cause of action accrues upon the claimant sustaining actionable damage. This is often later than the date on which the breach of duty occurs.

There are a number of possible extensions and alternatives to the six-year limitation period. Sometimes a claimant will not appreciate that it has suffered damage until after the expiry of the six-year period. Under Section 14A of the Limitation Act 1980, a claimant may bring a claim within three years of the date on which it first acquires the requisite knowledge for bringing the claim. There is a significant body of statutory and case law governing how this works and there is a 15-year longstop provision (although this does not apply to cases involving personal injury).

The six-year period can be extended by agreement either at the outset of the professional's engagement (for example, if the engagement is made by deed) or during the course of any subsequent dispute. The limitation period will also be extended in certain situations. If the case is based on the fraud of the defendant or a material fact has been deliberately concealed, the limitation period will not begin to run until the claimant has or could reasonably have discovered the fraud or concealment (see Section 32 of the Limitation Act 1980). Limitation for claims in equity can be more complex and needs special care.

### iii Dispute fora and resolution

Civil claims against professionals are generally brought in either the business and property courts of the Chancery Division of the County Court and the High Court or in the Technology and Construction Court (TCC). The procedure for the prosecution of claims through the courts is set out in the Civil Procedure Rules 1998 (CPR), with Part 60 of the CPR and the related practice direction setting out the procedure specific to the TCC. The TCC primarily deals with claims against engineers, architects, surveyors and accountants where the amount in dispute is in excess of £500,000 (in non-adjudication cases only). The limit does not apply outside London. The TCC also deals with claims against solicitors that involve technical matters such as planning, property and construction. Additional guidance on the conduct of claims can be found in the Chancery Court Guide and the TCC Guide.

Prior to commencing proceedings, parties are expected to have adhered to a pre-action protocol. There is a Pre-Action Protocol for Professional Negligence Claims and a separate Pre-Action Protocol for the Construction and Engineering Disputes for claims against engineers, architects and quantity surveyors. The pre-action protocols provide a framework for parties to resolve disputes without involving the court. The court may impose costs sanctions on parties who fail to comply with the pre-action protocols.

Even after proceedings have been issued, the courts encourage parties to engage in alternative dispute resolution (ADR). This can take the form of direct negotiations or mediation. Again, there is a risk of costs penalties being imposed by the court against any party or parties if they unreasonably refuse to engage in ADR, even if that party succeeds at trial.

Another method used for resolving claims against professionals is arbitration. It is most frequently used in claims involving construction professionals in circumstances where the parties have entered into a contract and it provides for any disputes arising from the contractual works to be referred to arbitration. Arbitration is a non-judicial means of resolving disputes where the parties appoint an arbitrator or panel of arbitrators. Arbitration is sometimes a quicker and cheaper means of dispute resolution than litigation. It has the benefit of being a confidential process but enforceable by the court. The arbitrator's decision is binding on the parties and there are limited grounds of appeal.

### iv Remedies and loss

The aim of compensatory damages for professional negligence is to award 'the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong'.[7] This test requires the careful identification of the nature of the advice that ought to have been provided and, thereafter, the claimant will have to prove on a balance of probabilities that he or she would have followed such advice so as to achieve some better outcome.[8] Where the better outcome also involves the unrestricted volition of a third party the court may award damages for loss of the chance of achieving that outcome.[9] Some cases have awarded claimants recovery for lost chances significantly smaller than 25 per cent.[10] Defences to professional negligence claims commonly focus on these kinds of causation and loss arguments.

In addition, the courts do not compensate for loss arising from risks that it was no part of the professional's duty to protect against.[11] A client is usually taken to have accepted the risks of a transaction in respect of which he or she has not sought advice. This principle traditionally required the court to make fine distinctions between the nature of advice and information provided by the professional, although in 2021 the Supreme Court endorsed a shift towards examining the 'purpose' of the advice.[12] The prominence of this principle when assessing a professional's liability tends to eclipse other filters for limiting damages (e.g., arguments that loss is too remote).

Compensation for the other forms of professional liability may be assessed on different bases: for example, the solicitor who incorrectly warrants authority to commence litigation may be liable for damages on the assumption the warranty was true; the professional trustee may be required to restore in full lost trust funds regardless of issues of fault; and the fiduciary that receives an undisclosed profit may be required to disgorge it to the principal even if the principal would have agreed to its retention if it had been disclosed.

Finally, while contractual devices for limitation and exclusion of liability are often used in retainers as a means of reducing liability exposure, they do not feature prominently in reported cases. There are probably two reasons for this: the first is that such devices are subject to statutory control[13] and, therefore, are not always effective; the second is that the professional's regulatory arrangements often prohibit or limit their use.[14]

## Specific professions

### i Lawyers

The Law Society is an independent professional body that represents the majority of solicitors in England and Wales. It provides support and advice to the legal profession and promotes the role of solicitors.

Solicitors are regulated by the Solicitors Regulation Authority (SRA). The SRA's role is to prescribe standards for the solicitors' profession to protect the public and to ensure that clients receive good service. The SRA's rules are 'SRA Standards and Regulations'

and comprise a collection of free-standing codes and rules covering, for example, the professional conduct of solicitors (the Code of Conduct for Solicitors, RELs and RFLs-[15]), regulated firms (the Code of Conduct for Firms), the holding of client money (the SRA Accounts Rules) and the requirements for professional indemnity insurance (the SRA Indemnity Insurance Rules). These standards include mandatory principles for all solicitors, such as upholding the rule of law and administration of justice and acting in the best interests of clients.

A firm of solicitors must appoint a compliance officer for legal practice (COLP) and for finance and administration (COFA), who are responsible for the firm's systems and for managing the risks to the firm's delivery of legal services. The COLP and COFA must record any misconduct or breaches of compliance with the SRA rules and self-report breaches promptly to the SRA. The SRA has statutory grounds to intervene in the running of a firm of solicitors if it suspects dishonesty or material breaches of the SRA Handbook.

The Solicitors Disciplinary Tribunal (SDT) is an independent tribunal in which solicitors can be prosecuted for their conduct. The SDT is independent from the SRA and has its own powers and procedures. It can make findings of misconduct and impose sanctions, including fines, suspending a solicitor from practice or striking a solicitor off the Roll.

All solicitors' firms are required to maintain professional indemnity insurance in the event of claims against the firm. The insurance policy must comply with the SRA's Indemnity Insurance Rules. The insurance policy must be with an authorised insurer that has entered into a participating insurer's agreement with the Law Society. The policy terms must include a limit of cover of £3 million for any one claim.

### ii Medical practitioners

Negligence claims against medical practitioners can arise in any discipline and range from lower-value claims to multimillion-pound complex cases (such as brain injury caused by perinatal error, or late diagnosis of cancer). They will almost always be claims for personal injury, including where the patient denies having given informed consent to treatment.

While such claims follow the general applications of the law of tort, usually negligence (duty, breach, causation), there are key differences, particularly in relation to limitation periods and remedies. For medical claims, the limitation period is three years (except where the claimant is a child or lacks capacity) and runs from the negligent event, the claimant's date of knowledge or the patient's death.

In negligence claims against clinicians the claimant's most important remedy is damages where the aim is to put the claimant in the same position he or she would have been in had the tort not occurred. Damages are split into two parts. General damages are awarded for pain, suffering and loss of amenity and are determined on a tariff-style basis (additional psychiatric injury will increase the award). Special damages are case-specific and compensate a claimant for financial loss suffered as a result of the clinician's negligence. Provision is made for anticipated future loss with complex calculations using discounts and multipliers to ensure an appropriate outcome. Different quantification principles apply when the patient has died.

Each medical professional body has its own regulator. These include the General Medical Council (GMC) for doctors, the Nursing and Midwifery Council for nurses, and the Health

and Care Professions Council for certain others, including, for example, psychologists and radiologists. Each regulatory body will set standards and codes for its members. For example, the GMC's Good Medical Practice guidance sets out the relevant standards for doctors. All regulators stipulate that medical professionals must have adequate or appropriate indemnity arrangements in place before they can practise.

### iii Banking and finance professionals

The key legislation governing the regulation of banking and financial professionals is the Financial Services and Markets Act 2000 (FSMA). Under Section 19 of FSMA a person cannot carry out a regulated activity unless authorised or exempt. Regulated activities include accepting deposits and advising on, arranging or dealing in investments.

The three main regulators are the Bank of England, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The Bank of England is primarily responsible for failing banks. The PRA promotes the safety and soundness of financial institutions, and the FCA is responsible for protecting consumers and the conduct of business. Both the PRA and the FCA promote competition within the industry.

Aside from FSMA, the main rules applicable to banks and financial professionals are contained within the PRA and FCA handbooks. Both the PRA and the FCA issue further guidance and thematic reviews, which establish expectations of banks and financial professionals.

The PRA and FCA can take disciplinary action both against banks or regulated financial institutions and against controlled function holders that have contravened their rules. In addition, by virtue of the Senior Managers and Certification Regime, the PRA and FCA's conduct rules have also been extended beyond controlled function holders to certain other individuals within such institutions.

Claims can be brought through the courts or through the Financial Ombudsman Service (FOS) or the Pension Ombudsman Service (POS). In contrast to claims brought through the courts and the POS, claims through the FOS will not be decided on the basis of legal principles but on a fair and reasonable basis. When deciding on a fair and reasonable outcome, the FOS is expected to take account of the law, relevant rules and good practice in the industry.

The Financial Services Compensation Scheme (FSCS) acts as deposit insurance for eligible customers and is funded by financial services firms. Where an authorised financial institution is insolvent, individuals can claim up to £85,000 for deposits and, for investment or mortgage advice, £85,000 if the insolvency occurred after 1 April 2019, or otherwise £50,000. In addition, most FCA-regulated firms are required to have professional indemnity insurance as an extra financial resource and to prevent excessive claims on the FSCS.

### iv Computer and information technology professionals

Claims against software and information technology professionals by their clients tend to be governed by standard form service contracts. There are a range of voluntary professional standards to which information technology professionals may subscribe and which can be

written into service contracts. Among the range of issues most likely to arise in disputes are:

1. the incorporation of terms and conditions into the service contract;
2. interpretation of client requirements for the scope of services;
3. representations relating to scope, price and timescale;
4. effect of limitations of liability;
5. contract termination; and
6. service levels.

For organisations controlling or processing personal data, the impact of the EU and (post-Brexit) the UK General Data Protection Regulation (GDPR) will need to be considered.

Article 24(1) of both the EU GDPR and the UK GDPR requires that data controllers 'implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with [the GDPR]'. Article 32(1) requires that data controllers and processors 'implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk'. Breach of these requirements could lead to enforcement action by the Information Commissioner's Office in the UK and, in cross-border cases, by other EU and European Economic Area bodies. These requirements are often written into commercial agreements.

Both the EU GDPR and the UK GDPR contain rights of recourse for data subjects for data protection breaches.[16] Direct claims by data subjects against data controllers have expanded significantly; however, a number of recent decisions handed down across all levels of the courts have created various potential barriers to data subject claims.[17-] Nevertheless, this continues to be an area of potential exposure to professional service providers controlling personal data.

### v Real property surveyors

In 2022, the Royal Institution of Chartered Surveyors (RICS) published new guidance on Japanese knotweed, aimed at combating the fear that the presence of the plant must reduce the value of any neighbouring property. The guidance shifts the focus from eradicating knotweed to managing it effectively. The note is significant because the presence and impact of knotweed on properties continues to be fertile ground for litigation, with the Court of Appeal recently handing down its judgment in the case of *Davies v. Bridgend County Council*. Although decided without reference to the new guidance (the trial took place before the note was published), that case nevertheless gives a helpful indication of the approach a court will take when considering damage caused to a claimant's property by the encroachment of knotweed from a defendant's land.

The year 2022 also saw the publication of an updated version of the EWS1 form, which is used in external wall system assessments for residential buildings. The amendments address various issues that had been identified with the original version and also reflect the introduction of PAS 9980, which is a new code of practice issued by the British Standards

Institution in January 2022. PAS 9980 gives recommendations and guidance for competent professionals to undertake fire risk appraisals of external wall construction for existing multistorey, multi-occupancy residential buildings. It applies where a risk is known, or suspected, to arise from the form of construction used for the external wall build-up, such as the presence of combustible material, and should now be applied where an assessor is completing an EWS1 form.

On 6 December 2022, RICS also published a new guidance note to help valuers undertaking valuations of domestic residential blocks or flats of at least five storeys or 11 metres tall. The note provides guidance on the information valuers need to take into consideration and the approach they should take when preparing a valuation, including whether it is reasonable to make certain assumptions about the subject property and the ability of the building owner to pass on any building defect costs to the leaseholder.

### vi Construction professionals

Issues with fire safety defects continue to dominant the agenda for construction professionals. The outcome of the second phase of the Grenfell Enquiry is still awaited and its conclusions as to who bears responsibility for the tragedy will no doubt spark further litigation against construction professionals involved in the design and construction of other buildings with fire safety defects.

In addition, the Building Safety Act came into force in April 2022, making fundamental changes to the law relating to the construction of residential property. This Act aims to improve the process for constructing and managing high-rise residential buildings (HRBs), to ensure they are safe for anyone living in or around them. The Act establishes a regime to identify the people responsible for safety during the design, build and occupation of HRBs, and it introduces a gateway system to ensure regulatory requirements are met at different stages of the planning and construction process. It establishes the role of the Building Safety Regulator, who will be responsible for overseeing safety and standards, helping construction professionals to improve competence and leading the implementation of the new regulatory framework for HRBs. The Act also creates new mechanisms through which building owners and tenants can pursue claims, including through remediation orders and remediation contribution orders, and provides significant protections for leaseholders, including the right to sue developers for defective works up to 30 years after a home is completed, through amendments to the Defective Premises Act, which now applies to the refurbishment of residential properties as well as new builds.

### vii Accountants and auditors

The accountancy and audit professions are regulated by their professional accountancy bodies, with individuals and firms being enrolled as members of one or other of them, subject to the current oversight of the Financial Reporting Council (FRC).

The FRC has statutory oversight of the audit profession pursuant to the Companies Act 2006. The FRC discharges these responsibilities by recognising certain professional accountancy bodies as recognised supervisory bodies (RSBs) and recognised qualifying bodies (RQBs). Currently, the RSBs are the Institute of Chartered Accountants for England and Wales (ICAEW) and Scotland (ICAS), Chartered Accountants Ireland (CAI) and the

Association of Chartered Certified Accountants (ACCA), and the RQBs are the ICAEW, ICAS, CAI, ACCA and the Association of International Accountants.

The FRC delegates certain regulatory tasks, including registration and authorisation, monitoring, professional conduct and discipline, to the RSBs in respect of their members who are statutory auditors and audit firms. The issuance of recognised professional qualifications for statutory auditors is delegated by the FRC to the RQBs, except for individuals and firms that undertake public interest entity (PIE) audits, which must be registered with the FRC in addition to having RSB audit registration, as from 5 December 2022. The FRC ensures that each RSB and RQB properly carries out its delegated functions and undertakes certain non-delegated functions itself, including investigation and disciplinary action for public interest cases. The FRC has power to impose enforcement orders or penalties against any RSB or RQB that does not comply with its responsibilities.

Accountants and accountancy firms who are not exercising an audit function are regulated by the professional accountancy bodies to which they belong. By agreement with six professional accountancy bodies, the ICAEW, ICAS, CAI, ACCA, the Chartered Institute of Public Finance and Accountancy and the Chartered Institute of Management Accountants, the FRC has a non-statutory role in the oversight of the regulation of their members beyond those that are statutory auditors. This oversight also includes registration and authorisation, monitoring, professional conduct and discipline.

Each professional accountancy body has its own insurance scheme requirements. They all require their members to have some form of professional indemnity insurance including compulsory limits of indemnity and minimum terms.

The government previously announced plans for the FRC to be replaced by a new regulator called the Audit, Reporting and Governance Authority (ARGA) following a review of the FRC's powers in 2018 and 2019 by Sir John Kingman, the Competition and Markets Authority and Sir Donald Brydon. The ARGA is intended to take over responsibility for licensing and regulating the large audit firms involved in PIE audits from the UK accountancy bodies, in particular the ICAEW. The intention is that the ARGA will have increased enforcement powers. Although the understanding is that the ARGA's authority will be put on a statutory footing as soon as parliamentary time allows, it is not expected to replace the FRC any earlier than April 2024.

### viii Insurance professionals

Insurance professionals have been heavily scrutinised in recent years. The FCA's thematic review, a tough line taken by judges in claims against brokers, the implementation of the Insurance Act and, now, concerns over insured clients not being covered for all their covid-19 losses (and blaming their brokers for this) have contributed to ensuring that insurance professionals have high standards to uphold.

Insurance professionals are governed by the FCA. The FCA's thematic review of insurance professionals investigated issues such as broker conflicts and the transparency of broker commissions. Insurance professionals have been reflecting on how they manage any conflicts of interest within their business models and making necessary changes. Following the review, merger and takeover activity within the broker community increased.

Case law has further highlighted that brokers must understand their client's business, their client's insurance requirements and the insurance that they are placing for their clients. Linked to this, a broker must take time to ensure that its client understands the insurance that it has procured, including highlighting any particularly onerous aspects of the policy and not exposing its client to unnecessary litigation. Decisions in cases such as *Jones v. Environcom, Ground Gilbey v. JLT, Eurokey v. Giles, Dalamd Limited v. Butterworth Spengler Commercial Limited, ABN AMRO Bank NV v. Royal and Sun Alliance Insurance Plc* and *Brian Leighton (Garages) Ltd v. Allianz Insurance Plc* have provided up-to-date guidance for brokers in this area. Topical issues include the need to understand (and explain to their clients) what a cyber policy covers; and the practical implications of a covid-19 or infectious disease exclusion.

Insurance professionals must understand the Insurance Act 2015, which came into force in August 2016. As part of the duties highlighted in the paragraphs above, a broker has a duty to understand and highlight the impact that the Insurance Act 2015 has on the policies that it is placing for its client.

Finally, insurance professionals will be aware that the FOS limit increased from £150,000 to £350,000 for complaints referred to the FOS after 1 April 2019, and this has now increased to £415,000 for complaints made after 1 April 2023 (although still applicable to acts or omissions occurring on or after 1 April 2019). Coupled with the widening of the definition of eligible FOS complainants, this could lead to an increase in attempts to make claims against insurance professionals through the FOS.

In summary, insurance professionals must understand the insurance that they are placing and the nature of the business for which they are seeking to procure insurance. They must also ensure that their clients are aware of the cover that they have and the relevant cover that they do not have. The developments in case law, the fact that lots of professionals are now paying more in premiums (but obtaining less cover), the Insurance Act 2015 and the FCA's thematic review have made this clear.

## Year in review

The year 2022 saw considerable political and economic instability brought about by, inter alia, the enduring impact of the covid-19 pandemic, the repercussions of Brexit and the war in Ukraine. The professional sector has been navigating some challenging (and often previously uncharted) waters as a result. The economic effects of the covid-19 pandemic, in particular, are now starting to generate large claims in certain professions.

The past year proved to be an eventful one for law firms, their advisers and the SRA. The SRA has taken a keen interest in workplace culture and conducted a thematic review of this area. This was followed by a consultation on proposed changes to enhance SRA powers to deal with risks stemming from poor workplace culture. This is in addition to an increasing number of inquiries and rebukes involving antisocial behaviour by solicitors, including sexual misconduct, in relation to which the SRA has now published updated guidance. The true impact of these initiatives is expected to be seen in 2023, particularly as SRA consultations typically lead to increased enforcement.

One of the defining features of the year has been the continuing surge of buyer-funded development scheme claims. The issue has been on the SRA's agenda for some time and

its concerns are encapsulated in its warning notice about unregulated collective investment schemes and the use of solicitors to legitimise such schemes. The claims are typically high value, with multiple claimants, and give rise to complex liability and coverage issues (including questions over dishonesty and aggregation). There is also obviously potential regulatory exposure for firms facing such claims (the potential for conflicts of interest is just one problematic aspect of these transactions). New case law has emerged on the subject, however, providing some optimism for solicitors acting in or defending claims in this arena. This includes *Various North Point Pall Mall Purchasers v. 174 Law Solicitors Ltd v. Key Manchester Ltd*,[18] which scrutinised the circumstances in which investors' deposits should be released by solicitors acting for developers in the capacity of stakeholder. The judge held that the deposits were lawfully released with the authorisation of the buyers and the claimants' solicitor. Notably, too, the SRA has decided to reduce the profession's contributions to the SRA Compensation Fund because an expected spike in payouts to investors has not transpired. Despite this, new claims continue to arise and this trend is expected to continue.

There was a welcome development for professional advisers operating in the tax sector. In *McLean v. Thornhill*,[19] the Court of Appeal upheld Mr Justice Zacaroli's judgment holding that an experienced tax barrister was not liable to prospective investors for advice given to the promoter of a failed tax scheme. The advice had appeared in the promoter's investment memorandums and the barrister had expressly agreed to it being shared with the prospective investors in that way. Despite this, the Court of Appeal held, among other things, that the barrister did not owe a duty of care to the investors as non-clients. It was recognised that the investors would have derived comfort from the fact that such an experienced barrister had endorsed the scheme and that his advice went to the heart of what made the scheme attractive to investors (i.e., its tax efficiency). Those matters pointed towards the existence of a duty but were displaced by other critical factors such as the sophistication of the investors and the fact that the advice appeared in promotional material on behalf of a party on the opposite side of the transaction. Moreover, it was relevant that the investment memorandums expressly recommended that investors take independent advice. These investors had access to an experienced independent financial adviser to whom they could turn for that advice and it was reasonable for the barrister to assume that they would do so. It has always been challenging for a non-client to assert that it is owed a duty of care by a professional adviser, and the Court of Appeal decision helpfully reinforces the reasons why this must remain the case. The decisions do, however, highlight the importance of carefully worded disclaimers where advice is being proffered for a limited purpose (and audience) only. The judgments in this case also provide essential guidance on the circumstances in which a duty to warn clients will form part of a professional's obligations.

## Outlook and future developments

A prominent theme for 2023 is the increasing importance of environmental, social and governance (ESG) matters around the world. This will have an impact across all professional sectors, both in terms of how they operate their own businesses and in terms of the advice given to clients. There is a significant amount of national and international regulatory reform under way, and ESG is already driving litigation trends (growing public awareness and scrutiny of greenwashing practices, for example, has proved fertile ground

for high-profile legal challenges). The adequacy of professional advice on ESG matters can be expected to come under scrutiny and there is ongoing potential for claims from investors, employees and others, as well as regulatory and governmental intervention.

The economic volatility of the past year is expected to continue, including the current 'cost of living crisis' and warnings from the International Monetary Fund that we are about to enter one of the worst recessions on record. Periods of financial instability and economic downturn tend to encourage claims across a broad spectrum of professions and this will be exacerbated by the sharp increase in corporate insolvencies seen in 2022. We therefore continue to predict that there will be a variety of claims against professionals as losses start to crystallise.

## Endnotes

**1** Nicholas Bird is a partner and Bryony Howe is a senior associate at Reynolds Porter Chamberlain LLP. ^ Back to section

**2** See Section 13, Supply of Goods and Services Act 1982: 'In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.' ^ Back to section

**3** See*Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582. ^ Back to section

**4** See*Montgomery v. Lanarkshire Health Board* [2015] AC 1430. The test proposed was 'whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it'. See also *O'Hare and Anor v. Coutts & Co* [2016] EWHC 2224 in the context of financial advisers. ^ Back to section

**5** See*Barker v. Baxendale Walker Solicitors (a firm) & Anor* [2017] EWCA Civ 2056. ^ Back to section

**6** For example, the Financial Ombudsman Service or the Legal Ombudsman. ^ Back to section

**7** See*Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39. ^ Back to section

**8** See*Perry v. Raleys Solicitors* [2019] UKSC 5. ^ Back to section

**9** See*Allied Maples Group Ltd v. Simmons & Simmons (a firm)* [1995] EWCA Civ 17, [1995] 1 WLR 1602. ^ Back to section

**10** See*Hanif v. Middleweeks (a firm)* [2000] Lloyd's Rep PN 920. A different approach may be adopted where the lost chance concerns medical negligence and the prospects of recovery from an untreated condition – see *Gregg v. Scott* [2005] UKHL 2; [2005] 2 AC 176. ^ Back to section

**11** See*BPE Solicitors & Anor v. Hughes-Holland* [2017] UKSC 21, [2017] 2 WLR 1029. ^ Back to section

**12** 'In cases falling within [the] “advice” category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against . . . . By comparison, in the “information” category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers).' See*BPE Solicitors* at paragraphs 40 and 41. See, however, the recent Supreme Court decision in *Manchester Building Society v. Grant Thornton*, which is said to represent an expansion of the principles laid down in *BPE Solicitors*: the information versus advice distinction is now less rigid, and the courts must examine the purpose of the advice and the risks that the advice was intended to protect against. ^ Back to section

**13** See the Unfair Contract Terms Act 1977 and, where the client is a consumer, the Unfair Terms in Consumer Contracts Regulations 1999. ^ Back to section

**14** For example, mandatory Outcome 1.8 of the SRA Code of Conduct 2011 prohibits solicitors from excluding liability below the minimum mandated limit of insurance cover. ^ Back to section

**15** Registered European lawyers and registered foreign lawyers authorised by the SRA. ^ Back to section

**16** Articles 79 and 82. ^ Back to section

**17** *Lloyd v. Google LLC* [2021] UKSC 50, *Warren v. DSG Retail* [2021] EWHC 2168 (QB), *Johnson v. Eastlight Community Homes* [2021] EWHC 3069 (QB), *Stadler v. Currys Group Ltd* [2022] EWHC 160 (QB). ^ Back to section

**18** *Various North Point Pall Mall Purchasers v. 174 Law Solicitors Ltd v. Key Manchester Ltd* [2022] EWHC 4 (Ch). ^ Back to section

**19** *McLean v. Thornhill* [2023] EWCA Civ 466. ^ Back to section


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## Summary

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# Introduction

## i Legal framework

The duty of a professional is to adhere to the reasonable standard of care of a well-qualified professional acting under the circumstances presented. In simple terms, this means providing services with reasonable care and skill. Generally, the duty of reasonable care arises from the retainer. Most professional liability claims are tort arising from contract. The scope of duty can be limited in the retainer or by the scope of the undertaking. Although the duties are terms implied in the contract, professional liability could flow to third persons based on principles of reliance or the provision or information of services for the benefit of third persons.

There is no uniform national regulation of professions. Professions are regulated and licensed by the individual 50 states and territories. Professional liability law is an amalgam of common law principles of legal precedent and state regulation. Lawyers are governed by rules of conduct and disciplinary agencies administered by their respective state supreme courts. Lawyers admitted to practise in the federal courts are also subject to discipline in those courts. However, all other professional regulation and discipline is managed by state boards or agencies.

A professional licensed in one state can practice in another state only by permission of the other state. Tolerance of crossing state or national borders is becoming relaxed, but individual states hold a monopoly over the right to regulate and discipline their own professionals and 'foreign' professionals operating within their boundaries. In addition, there are federal regulatory schemes that apply to the conduct of the professionals in their endeavours that fall under federal jurisdiction, such as in banking, securities, financial services, consumer rights and data privacy.

Professional negligence can be based on acts, errors or omissions and very often results from the failure to provide sufficient information for the client or patient to make informed decisions regarding a course of action. Liability is based not on the highest standard of care, rather on the standard of care professionals will ordinarily apply under like circumstances as shown by the evidence. A simple way to define professional negligence is to examine the court-approved jury instructions given by states in professional negligence cases.[2]

A professional who is a specialist in his or her field may be held to the standard of care of a specialist.[3] A professional's decisions are given latitude in matters of judgement and strategy. Thus, many jurisdictions accept a theory of judgemental defence or immunity.[4]

In addition to claims in tort or contract, professionals face liability for breach of fiduciary duties, meaning the highest duties of loyalty, honesty, integrity and good faith. Breach of fiduciary duty claims arise from contract, are equitable in nature and attach to professionals who stand in a special trust relationship, such as an attorney to a client. The damages are typically compensatory but may include disgorgement of fees or restitution of money or property.

Professional liability seeks to make the injured party whole. Compensatory damages and 'special' damages for past or reasonably certain future outlay of money are recoverable if

they are proximately caused by the professional's mistake. Damages for future expenses are reduced to a 'present cash value'. In rare cases, exemplary or punitive damages may be awarded in cases of a professional's wilful breach or fraudulent conduct.

### ii Limitation and prescription

Limitation periods for professional negligence claims vary among the 50 states. Typically, a cause of action for professional negligence accrues when the client or patient is injured and either knew or should have known of his or her injury and that it is wrongfully caused. This is generally described as a 'discovery rule' and is illustrated in the statutes below. Many states also have outside time limits, which are absolute, or a 'repose' date by which a claim must be filed. Limitation and repose periods can be extended based on the age of minority, incapacitation, disability, military service and by acts of 'fraudulent' concealment of the cause of action by the professional.

States may have different limitations for different professions. In California, the limitation period is one year for an action against an attorney, other than for fraud arising from professional services. The one year commences when the client, through use of reasonable diligence, should have discovered the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. A wrongfully convicted criminal has two years after he or she achieves a post-conviction exoneration.[5]

New York state has a three-year statute of limitations for all professional malpractice other than medical, dental or podiatric malpractice, whether the theory is based in contract or tort.[6] The limitation for medical, dental or podiatric negligence is 2.5 years from the date of accrual.[7] In Illinois, limitations for accounting, legal, real property design professionals and medical malpractice are covered by separate statutes, but the limitation periods expire two years from the date the person bringing the action knew or reasonably should have known of the injury for which damages are sought.[8]

Other states may mimic the limitations on contracts that could be in the range of five to six years from discovery. For example, in Wisconsin limitations for breach of contract and for legal negligence are both six years.[9]

Limitations can be extended by agreement and limitation tolling agreements are commonplace to defer or resolve claims without litigation.

### iii Dispute fora and resolution

Professional liability claims are typically brought as actions at law in the states' civil courts and are triable before a lay jury. The right to a jury trial in a civil trial is guaranteed by the United States Constitution and this right is followed by states.[10] A 12-person jury is commonplace, but the Constitution guarantees a minimum jury of six jurors for a civil trial.-[11] States' constitutions also guarantee this right.[12] The right to a jury may be waived, but in California the right cannot be waived by contract prior to a court proceeding.[13] In cases of waiver, a judge decides all issues. Cases qualifying for federal court jurisdiction, for example, because of diversity of citizenship among the litigants, may proceed in a United States district court.[14] The district courts are the general trial courts of the United States federal judiciary.

The plaintiff's burden of proof in professional negligence cases is typically a 'preponderance of the evidence', based on a level of probability greater than 50 per cent. Lay jurors are not considered qualified to determine whether professional negligence has occurred without relying on the testimony of qualified expects in the field. Experts testify to the ultimate issues of professional negligence and linkage to the damages. An expert is unnecessary, however, in cases applying a 'common error exception' such as a missed deadline or obvious mistake.

A client may have contributed to his or her own injury. Most states allow the jury to apportion fault among parties under a doctrine of comparative fault, which is a partial defence to negligence. Alabama, Maryland, North Carolina and Virginia continue to use contributory negligence, which is a complete defence to negligence.[15] States differ on the calculus, but, in states acceding to 'pure comparative fault', the jury will prorate the percentage of fault, and the recovery is reduced by the proration. Pure comparative fault applies in Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island and Washington. Other states 'modify' comparative fault to hold that if a plaintiff's contributory fault is at least 51 per cent then the professional prevails. The 51 per cent bar rule applies in Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey and Ohio.[16] The 50 per cent bar rule states are Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, South Carolina, Tennessee, Utah and West Virginia.

A professional has rights of contribution or indemnity against other persons, including professionals, responsible for the clients' injuries. These are typically brought as 'cross claims' or third-party claims within the principal case. States have differing statutes and limitations governing third-party practice that are difficult to generalise. Nevertheless, typically, there is a method to claim recoupment of a settlement or adverse judgment if it can be proven to exceed a defendant's fair share. A common feature is that a professional settling in good faith will be discharged from the case with prejudice, and the non-settling parties will benefit from an offset for the sum paid in the settlement.[17]

Retainers may specify alternative dispute resolution methods, commonly private mediation, arbitration or both. Courts will enforce arbitration clauses made at arm's length. The parties are free to choose the level of formality of the arbitration process. Many select institutional arbitration[18] administered by the American Arbitration Association, which has formalised rules and procedure.[19] A court may enter and enforce an arbitration award as a binding judgment. By rules of professional conduct, a lawyer may not contract to prospectively limit liability to a client unless the client has independent representation.[20]

### iv Remedies and loss

With certain exceptions where federal law conflicts with or pre-empts state law, such as federal securities regulation, professional liability and remedies are matters of state law. Arriving at legal policy where precedent is lacking may involve consideration of divergent majority and minority views among sister states. In any case or controversy brought before one of the district courts, federal courts generally will look to tort law of the state where the act or omission occurred, to determine substantive law.

Except in limited situations, such as medical negligence, there are no universal pre-action protocols beyond reasonable and good faith inquiry into the facts and law. In the absence

of a fee-shifting contract, a statue or a court sanction imposing monetary penalties for false or meritless claims, the prevailing party is not entitled to recover its fees.[21] This is familiarly called the 'American Rule', which reasons that parties to a lawsuit are responsible for paying their own attorneys' fees and costs and that a plaintiff should not be deterred out of fear of prohibitive costs.

## Specific professions

### i Lawyers

Lawyers' liability follows the general principles described above, with some variances. An action may be pleaded in tort, contract or theory such as breach of fiduciary duty, but the damages are typically only pecuniary in nature. Non-economic damage, such as emotional distress, is an exception found in peculiar cases involving a fiduciary who has reason to know emotional injury is likely to occur from the breach.[22] Cases are compound in that a plaintiff must prove not only that the lawyer erred but also that he or she would have fared better in the underlying case within the case. Causation can be daunting because the plaintiff needs to win two cases. In transactional errors, plaintiff must prove he or she would have achieved the better deal. He or she may need to prove he or she would have collected the missed debt.

The role of qualified legal experts is paramount because the jurors must rely on them. They testify on the standard of care, breach and also on how the breach caused the damage. Experts testify on direct examination and must stand cross examination.

Each state supreme court maintains the right to license, regulate and discipline all lawyers practising within its boundaries. The chief disciplinarian may hold the office of administrator, bar counsel, disciplinary counsel or general counsel or similar title. A few states delegate discipline to a state bar association. District courts also have authority to admit, regulate and discipline lawyers admitted to practise in federal courts. Further, patent and trademark lawyers are concurrently admitted to practise before the United States Trademark and Patent Office, which has its own Office of Enrolment and Discipline.[23] Also, the United States Department of Justice and military branches maintain their own disciplinary agencies.

Despite the disparate systems, all jurisdictions have substantially, if not verbatim, adopted the American Bar Association Model Rules of Professional Conduct as the standards of conduct, ethics and discipline for American lawyers.[24] The violation of a Rule is grounds for discipline. The Rules do not give rise to a cause of action but are admitted in a civil case, usually by an expert describing their relevance to the standard of care. Each Rule contains comments that provide context, guidance and interpretation of the Rules.

Lawyers and law firms are not universally required to carry professional indemnity insurance and unfortunately many solo practitioners do not. A few states do require insurance. Some states require that lawyers without coverage place their clients on notice of this.[25] Twenty-three states require lawyers to disclose in their annual registration statement (which is available to consumers online) whether they carry professional liability

insurance or not.[26] However, to qualify for limited liability, firms may be required to carry minimum coverage limits.[27]

### ii Medical practitioners

Individual state medical boards regulate the activities of more than 1 million healthcare professionals in the United States, inclusive of physicians, nurses, dentists, chiropractors, podiatrists and others.

Medical malpractice claims comprise a very significant component of personal injury litigation in terms of aggregate claim volume and loss exposure. The theory of recovery is almost uniformly negligence. Doctors often form independent entities that contract their services to hospitals. Agency issues are often litigated when the plaintiff seeks to hold a hospital vicariously liable for on-site care provided by independent contractors, as opposed to in-house employees. Whether an institution is liable often turns on the degree of control over the independent medical contractor's work or a reasonable apprehension of apparent agency.

The standard of care must be established through the opinion of a professional qualified in the medical discipline at issue. Professional associations and academic and research institutions across the nation contribute to the development of medical care standards. Hospital policies and procedures may also inform the standard of care.

Compensatory damages include sums for mental anguish, disfigurement, future medical expenses, future lost wages, long-term physical pain and suffering, loss of consortium and loss of enjoyment of life. Some of these damages are easy to quantify and project through medical bills, rehabilitation expenses and earnings records. Others are more difficult to monetise and, therefore, are subject to the collective wisdom, views and personal experiences of the jury analysing the evidence.

As part of ongoing tort reform, damages limits, or caps, are seen in medical malpractice cases. Several states' statutes limit damages recoverable in an attempt to alleviate the increasing cost of malpractice insurance. State supreme courts act as checks on state legislatures, occasionally striking down statutory limits as unconstitutional. The form, scope and applicability of the caps vary greatly among the states. Some states cap certain types of damages such as non-economic damages (e.g., pain and suffering), while others place one hard cap on the total amount of an award.[28] Some use a combined approach limiting both certain categories of damages and the total award.[29] Some states limit or bar punitive damages altogether.

Seven states require physicians and health professionals to maintain a minimum level of professional indemnity insurance. These are Colorado, Connecticut, Kansas, Massachusetts, New Jersey, Rhode Island and Wisconsin. Mandatory coverage limits vary greatly. Premiums vary by location and specialty, with higher premiums for the higher-risk specialties such as surgeons, obstetricians and gynaecologists. Most physicians and health professionals are insured. Many hospitals, however, are self-insured.

Several states have pre-action protocols. Illinois, Florida and other states require an affidavit of merit as an attachment to the complaint. This affidavit certifies that the claimant has consulted with a qualified healthcare professional who, upon review of the care, believes there to be 'reasonable and meritorious cause'.[30] Florida's pre-action

requirements are more stringent than other states, requiring claimants to (1) notify each prospective defendant at least 90 days before filing a lawsuit, (2) turn over and release relevant medical records, and (3) try to resolve the case via out-of-court settlement.[31]

## iii Banking and finance professionals

The regulatory framework for banking and finance sectors is complex and expansive. It is derived from a confluence of statutes, regulations and industry standards from: (1) the federal government; (2) state and local governments; and (3) private sector self-regulatory organisations (SROs). The federal government plays a strong role, both directly and through federally appointed SROs, in regulating these sectors because of their macroeconomic impact both nationally and globally. As a corollary, the myriad of professional disciplines within these sectors tend to be regulated on a national level more so than in other professions. These professions include commercial bankers, investment bankers, broker dealers, investment advisers, certified financial planners and mortgage lenders.

### Securities regulation

The Securities and Exchange Commission (SEC) is an independent federal agency and the principal authority for regulating the securities industry, including the nation's stock and option exchanges.[32] These exchanges offer a number of investment vehicles in publicly traded corporations, both individually (e.g., stocks, bonds and stock options) or in aggregated funds (e.g., index funds, mutual funds and exchange trade funds). Disclosure laws and regulations for public companies are monitored and enforced by the SEC. The securities industry provides the capital markets essential to powering the national economy across industries. The SEC has delegated authority to promulgate and enforce certain industry standards and requirements for equity brokerage activities to Financial Industry Regulatory Authority (FINRA), a non-governmental SRO. FINRA provides a private forum for investors and parties in the securities industry to resolve disputes through arbitration or mediation.

### Commodities regulation

The Commodity Futures Trading Commission (CFTC) regulates the nation's derivatives markets and exchanges.[33] The derivatives markets includes the trading of futures contracts, foreign exchange contracts, swaps and certain kinds of options. The CFTC has delegated certain rule making and enforcement activities to the National Futures Association (NFA), a private SRO. The CFTC and NFA are very much the derivative market counterparts to the SEC and FINRA in the securities industry. Like the FINRA, the NFA provides a forum for alternative dispute resolution for investors and industry participants. While still significant to the overall regulatory scheme, the CFTC is less influential than the SEC. To the extent there is any overlap, the SEC generally reigns.

### Financial advisers

Individuals or firms in the business of providing securities-related investment advice in exchange for a fee are regulated as 'investment advisers' under the Investment Advisers Act of 1940. This statute defines the role and responsibilities of an investment adviser and protects consumers against misleading and fraudulent investment advice. There are state and SEC registration requirements for investment advisers that vary depending upon the amount of assets under management. A commodity trading adviser (CTA) is a particular type of investment adviser, either an individual or a firm, retained to provide advice regarding the buying and selling of commodities and other derivatives. CTAs are regulated through registration with the CFTC and membership in the NFA. Investment advisers are often considered fiduciaries and subject to the traditional fiduciary responsibilities of undivided loyalty and serving clients' best interests.

**Banking**

The Federal Deposit Insurance Corporation (FDIC) was created by the 1933 Banking Act to restore confidence in the banking system by, among other things, insuring deposits up to a certain amount at federally insured banks. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is the most recent piece of comprehensive federal legislation in the financial sector, passed in 2010 in response to the 2008 financial crisis. Dodd-Frank implemented significant changes affecting the oversight and supervision of systemically important financial institutions and related components, including commercial and investment banks. Dodd-Frank increased the amount the FDIC insures for deposits in member banks up to US$250,000 per ownership category.

**Liability**

Claims against banking and finance professionals are rarely brought in negligence due in large part to the limits of tort to restore purely economic losses for unfulfilled commercial expectations.[34] Intentional torts, however, such as aiding and abetting, fraud, interference with contract or prospective economic advantage do permit recovery of economic losses. Thus, the typical theories of recovery against banking and finance professionals include intentional torts and breach of contract. Because investment advisers are fiduciaries, they face added exposure for putting self-interests before investors. Civil remedies, including money damages and possible penalties, are also available for violations of federal and state statutes and regulations that provide a private right of action. Importantly, many of these statutory schemes include attorney fee awards to prevailing plaintiffs.

Because claims often involve questions of federal law or include litigants from diverse states, the most common forum for dispute resolution is federal district court. Many disputes find their way to specialised commercial courts at the state level. Arbitration and other alternative dispute resolution options through SROs (e.g., FINRA or NFA) or private arbiters (e.g., AAA) are commonplace and often preferred, depending on the activity or contract at issue.

## iv Computer and information technology professionals

States have yet to hold computer and IT professionals subject to professional liability remedies.[35] This distinction is important because a professional is responsible for a

higher standard of care beyond ordinary care, and losses for ordinary negligence may not allow recovery of purely economic losses.[36] A leading treatise argues that most practitioners in computer consulting, design and programming do not fit a model that creates malpractice liability.[37] Although IT practitioners require a high degree of skill, unlike traditional professions they are not restricted or regulated by state licensing laws or rules of ethics. 'If anything, programming skills have proliferated throughout the general public during the past decade and become less, rather than more, the exclusive domain of a profession specially trained and regulated to the task. Unlike traditional professions, while practitioner associations exist, there is no substantial self-regulation or standardisation of training within the programming or consulting profession.'[38]

Claims against computer and IT practitioners are governed by principles of contract under state law. There may also be general tort liability of ordinary care to avoid foreseeable injuries, which in the area of faulty programming and systems design for lost or corrupted data can be very substantial losses of business revenue and reputation.

Information technology services may extend to data protection and cybersecurity. These are related but separate concepts. Both encompass the protection of confidential information. Cybersecurity, however, has a more targeted focus and addresses how confidential or sensitive information can be compromised or 'hacked' through the use of technology. Data protection addresses the security of information in any format.

Unlike the comprehensive approach to personal data privacy adopted General Data Protection Regulation (GDPR) there is no single federal law or regulation that broadly protects the privacy of sensitive personal information. The United States has taken what some have described as a 'sectoral' approach to data privacy and protection. Various federal statutes, and accompanying regulations, involving the healthcare and financial services industries attempt to broadly protect personally identifying, medical and financial information.[39] The HITECH Act's final regulations were published in January 2013 as the HIPAA Omnibus Final Rule in (the Omnibus Rule).[40]

There are personal information security breach reporting statutes in all 50 states and territories.[41] The California Consumer Privacy Act (CCPA), which came into effect on 1 January 2020, may be the most sweeping.[42] The frequency of claims under the CCPA continues to soar.[43] The CCPA is often compared to the GDPR, but they differ in scope and definitions. The CCPA protects personal information supplied by the consumer but not information purchased or acquired by third-party persons. The CCPA grants consumers the rights: (1) to know what personal information is collected, shared or sold; (2) the right to delete personal information held by any business; (3) the right to opt out of the sale of personal information with special provisions as to children; and (4) the right to non-discrimination in terms of price or exercise of any privacy right granted under the CCPA.[44] Organisations are required to 'implement and maintain reasonable security procedures and practices' in protecting consumer data. The statute permits private remedies, including actions by the consumer for injunction and business damages on an individual or class action basis.[45]

Cybersecurity organisations create voluntary best practice standards. These include the International Organisation for Standardisation, the National Institute of Standards and Technology, a unit of the US Commerce Department and the Center for Internet Security (CIS). In 2014 the California Attorney General issued a data breach report indicating the CIS 20 'Critical Security Controls', which identify a minimum level of information security,

were reasonable measures and a 'failure to implement all of the controls that apply to an organisation's environment constitutes a lack of reasonable security'.[46] Security professionals may be certified by several non-government organisations, including the International Information System Security Certificate Consortium and the International Security Audit and Control Association.

Clearly, personal information protection will continue to be a growing area of claims for service providers and organisations.

### v Real property surveyors

Commercial and residential real estate transfers require the participation of multiple real property professionals such as real estate agents, brokers, property managers, appraisers and title professionals. Most of these professionals face some form of regulation. Real estate brokers and title agents, for example, are regulated by state statute that requires brokers and agents to meet certain educational requirements and pass a written examination before obtaining their licence.[47]

Common claims against real estate professionals include fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, violation of state consumer fraud statutes, violations of state regulatory statutes and the unauthorised practice of law. Fraudulent and negligent misrepresentation claims often relate to a failure to disclose pertinent information about the property or intentionally providing inaccurate or misleading information. Other claims may arise when a real estate agent acts for both the buyer and the seller or causes an inadvertent breach of client privacy, or when defects in title are discovered after the closing of the property. Depending on the jurisdiction, both compensatory and punitive damages are recoverable.

The duties of a real property professional are often set out by statute. In Illinois, for example, the Real Estate Licensing Act of 2000 sets out specific duties owed by a broker to the client, such as the duty to present in timely fashion all offers to and from the client, keep private all confidential information received from the client and exercise reasonable skill and care in the performance of brokerage services.[48] The duties of other real estate professionals, such as closing agents, are derived from common law. The specific duties vary between states, but some jurisdictions have held that closing agents owe fiduciary duties to all parties of the transaction.[49]

Occasionally, a real estate professional may face allegations of the unauthorised practice of law. While brokers are generally allowed to fill out some transactional documents, such as an offer of purchase or contract that was drafted by an attorney, they cannot prepare other legal instruments, such as deeds and mortgages. This is deemed to be the unauthorised practice of law because these services require the skill of an attorney. While many states do not allow for a private right of action for damages against the broker for the unauthorised practice of law, some statutes permit injunctive or contempt sanctions. Such a sanction could lead to disciplinary proceedings initiated by the state's real estate professional regulatory authority.

While the nature of real estate transactions leaves real estate professionals subject to a litany of claims, insurance coverage is not compulsory for most real estate professionals. Notably, however, clients often require their real estate professionals to have insurance.

### vi Construction professionals

Real property construction and design professionals, such as architects and structural engineers, are regulated by state law. Each state's regulatory authority and statutes require design professionals to obtain licences after meeting certain qualifications. These qualifications include passing an examination. These licences must be renewed periodically and many states require continual education courses and recertification.

Individual design professionals are not required to obtain professional liability insurance, although it is highly recommended. In 2021, the cost of litigating claims against design professionals and claim severity increased.[50]

Claims against design professionals are typically for breach of contract or professional negligence, although claims for personal injury, property damage, negligent or intentional misrepresentation or fraud may be warranted under certain circumstances and in certain jurisdictions. The nature of the claims against design professionals depends largely on whether the plaintiff is a client or a non-client.

The scope of the duties owed to a client by a design professional are typically set out in the contract for professional services, and any breach of the duties set out in the contract usually results in a breach of contract claim. Clients may also assert claims for negligence against design professionals for damage to other property or personal injury proximately caused by his or her negligence. Unless the written contract expressly outlines a specific standard of care, states' respective laws on the applicable standard of care will apply.

Claims brought by non-clients are usually brought under a theory of professional negligence and often seek damages for personal injury or property damage. If, for example, an engineer caused structural damage to a neighbouring property because he or she did not allow for proper adjacent support of the neighbouring property when performing excavation work, the engineer may be liable to the third party under a theory of negligence.

The economic loss doctrine has a significant impact on the nature of the claims allowed to proceed against a design professional.[51] While the economic loss doctrine has been adopted by the majority of states in the United States, its applicability differs greatly by jurisdiction. Some jurisdictions apply the traditional definition of the economic loss doctrine such that a party cannot seek recovery in tort for strictly economic losses arising out of a contract.[52] Notably, this would not apply to claims seeking recovery of damages for personal injury or other property damage. Other jurisdictions hold that privity of contract is a necessary element to recover economic losses in torts.[53] A number of other states have adopted a traditional tort analysis to determine whether a legal duty of care exists to protect third parties from economic loss.[54]

### vii Accountants and auditors

As at 2022, there were 665,612 certified public accountants (CPAs) in the United States.[55] CPA is an accreditation given to accountants who have passed the rigorous CPA exam and have met educational and work experience requirements. The CPA exam is formulated and scored by the American Institute of Certified Public Accountants (AICPA) and is used by all 50 states and US territories for CPA licensure. The disciplines of a CPA are wide-ranging,

including financial statement preparation engagements (i.e., compilations, reviews, audits), income tax return preparation and planning services, and consulting engagements.

Accounting and auditing standards are promulgated and regulated by the federal government, state and local governments, and by private sector SROs and professional associations. The various regulatory frameworks cater to the differing informational needs of stakeholders in the different sectors of the economy.

The Financial Accounting Standards Board (FASB) is a non-profit, private organisation officially recognised by the SEC to oversee and set accounting standards for the profession – the two foremost being generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS). The Public Company Accounting Oversight Board (PCAOB) – another private-sector, non-profit corporation – was created by the Sarbanes-Oxley (SOX) Act of 2002[56] to oversee accounting professionals who perform financial statement audits for publicly owned and traded companies.[57] The PCAOB is responsible for the registration, standard setting and disciplinary proceedings for accounting firms that audit publicly traded companies. Registration and discipline of the individual CPAs is carried out on the state level. Other standard setting and oversight authorities exist for federal, state and local governments.

Claims against accountants are typically for professional negligence. The issue of whether an accountant owes a duty to non-clients is governed by state law. Many states apply a 'privity of contract' requirement, which bars actions for civil damages by those who were not parties to the retainer.[58] An expert is required to establish breach of the standard of care.

The exposure in accounting malpractice claims often turns on the plaintiff's ability to establish a realised pecuniary loss caused by the accountant's alleged error. For example, if an accountant prepares an income tax return understating a client's tax liability that results in a deficiency assessment by the taxing authority, the increased tax assessment is generally not recoverable because the tax is owed regardless of any error in preparing the return. In some tax return cases, penalties and interest attributable to the preparer's error could be recoverable. The fees paid to another accountant to rectify errors in a prior return are often sought as damages. Similarly, a misstatement in a financial statement is not a recoverable loss in and of itself. Misstating a receivable balance does not necessarily impact on the collectability of the receivable. To be actionable, the misstatement must cause an actual loss. Plaintiffs often attempt to recover speculative lost profits allegedly caused by errors in financial statements. Most states do not altogether bar punitive damages, but their availability is limited to cases of gross negligence, recklessness or fraud.

A claim can sound in either tort or contract, but plaintiffs are limited to single recovery.[59] Unlike other professional relationships, a fiduciary relationship is not presumed between accountant and client.[60] This is because ethical standards pertaining to some of the most-fundamental 'accountant' services are antithetical to those of a fiduciary. Certain financial statement engagements, for example, require the accountant to make an objective and independent assessment of a client's financial condition, while a fiduciary must serve the client's best interests. Thus, the existence of a fiduciary relationship between accountant and client is often a factual dependent inquiry driven by the nature of the services provided. And, unless the accountant provides tax planning or other business advising services for the clients, the accountant–client relationship typically does not rise to fiduciary status. Courts are less inclined to imply duties beyond the express undertakings

in the engagement agreement. The existence of a fiduciary relationship will also dictate whether the accountant's conduct is assessed under a fiduciary standard, the highest standard of care under the common law or merely a reasonableness standard.

There are no state or federal laws or regulations requiring CPAs or CPA firms to carry professional indemnity insurance.

### viii Insurance professionals

Insurance agents and brokers are required by state statute or by state regulatory authorities to obtain a licence before they can sell or negotiate insurance.[61] To obtain a licence, an agent or broker is required to complete an educational course on insurance and pass the state's licensing exam. Although highly encouraged, individual brokers and agents are not required by state or federal law to be insured.

A large number of the brokers' and agents' alleged errors or omissions arise out of their failure to procure adequate insurance coverage. Most of these claims are brought under theories of negligence or breach of contract, although a limited number of states allow claims for breach of fiduciary duty.[62] An insurance agent or broker may be liable for procuring inadequate liability insurance if the insured requested certain liability insurance coverage and the agent or broker procured coverage less extensive than that requested. In these cases, the causation or proximate cause element to the negligence claim depends on whether the omitted coverage was available at the time the agent or broker procured the policy.

Some jurisdictions in the United States recognise a common law distinction between insurance agents and insurance brokers.[63] This distinction is significant as the duty owed to the insured by an agent can differ greatly from the duties owed by a broker. Generally, an insurance agent represents insurance companies to sell an insured a policy. Consistent with the rules of agency, an agent's conduct may be attributable to the insurer as the agent's conduct is within the scope of his or her employment.[64] Conversely, an insurance broker represents the insured in procuring a policy and the broker's primary duty is to the insured in their search for a policy.

A handful of states recognise a fiduciary relationship between insurance procurers and insureds. Most states recognise an elevated duty under the 'special relationship' test. Some of the factors the courts consider include whether there is a long-standing relationship between the agent or broker and the insured, whether the agent or broker presented himself or herself as an insurance specialist, and whether the insured relied on the advice of the agent because of the complexity of the policies.[65]

Claims against insurance agents and brokers by third parties are less successful. Most states hold that the duty of care is owed to the insured who retains the agent or broker for professional services and not to third parties.[66] An exception exists with respect to intended beneficiaries of the insurance contract, such as the beneficiary to a life insurance policy.[67]

## Year in review

Artificial intelligence (AI) and privacy statutes are the two most significant developments of 2022 and early 2023.

In late 2022 and early 2023, a number of firms released AI chatbots.[68] A chatbot is a computer program that employs AI and natural language processing to answer questions in a format simulating human conversation.[69]

In early 2023, some attorneys used the AI chatbot ChatGPT to generate work product, including written discovery requests, motions and legal research. In certain instances, reliance on ChatGPT has led to unwelcome consequences. For example, in June 2023, a federal court in New York sanctioned two attorneys for filing a response in opposition to a motion to dismiss that was created by ChatGPT.[70] The attorneys were opposing the defendant's motion to dismiss their client's claims as untimely and barred by the statute of limitations. ChatGPT generated arguments for a response brief that appeared to demonstrate the claim was timely. Problematically, however, these arguments were premised on several cases that did not exist. ChatGPT created these cases and presented them in a citation format that made them appear genuine, but no such cases existed.[71] Had the plaintiff's attorneys attempted to verify the accuracy and veracity of these cases by inputting the case citations into a traditional legal research database (e.g., Westlaw or LexisNexis), they would have learned that the cases did not exist. The plaintiff's attorneys did not do this before filing the response brief, however. When the defendant's counsel filed his reply in support of the motion to dismiss, he noted that the cases cited in the plaintiff's response brief could not be found. The court then entered an order requiring the plaintiff's attorneys to file copies of the cases, which subsequently led to the discovery and disclosure that the cases did not exist and had been fabricated by ChatGPT. In issuing an order sanctioning the plaintiff's attorneys, the court found that the attorneys abandoned their ethical obligations to verify the accuracy of the substance of the response brief and acted in bad faith in failing to acknowledge in a timely manner the role of ChatGPT in generating the brief. 'Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance,' the court concluded, stating further: 'But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.'[72]

The *Mata* case has generated significant press attention.[73] So much so, that other courts are modifying local rules and standing orders to impose 'no-AI' certification requirements. A district court in Texas recently promulgated a 'Mandatory Certification Regarding Generative Artificial Intelligence'. The certification states in part, 'All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.'[74]

Next to AI, developments in consumer privacy law represented the most significant development of 2022. In 2022, California, Virginia, Colorado, Utah and Connecticut enacted comprehensive privacy statutes.[75] These laws secure and impact on the privacy of consumer personal information.

Pursuant to these statutes, organisations are required to implement and maintain reasonable security procedures and practices in protecting consumer data.[76] The statutes permit private remedies, including actions by the consumer for injunction and business

damages on an individual or class-action basis.[77] Virginia's statute is effective and enforceable as from 1 January 2023. Amendments to the California statute are effective as from 1 January 2023 and enforceable on 1 July 2023. Colorado and Connecticut's statutes are effective and enforceable on 1 July 2023. Utah's statute is effective and enforceable on 21 December 2023. At the time of writing, it remains to be seen how these privacy provisions will be applied in the courts. Undoubtedly, claims will be forthcoming. Those professions in a fiduciary position and all professionals holding client information will have new obligations and added potential liability exposure if a data breach occurs.

## Outlook and future developments

It is inevitable that the professions will continue to grapple with the application of AI and technology in delivery of services. The standard of care of all professions will require as much.[78] Similarly, as more state enact consumer privacy laws, claims under these statutes will be widespread.

Endnotes

1 Katherine G Schnake and Barry F MacEntee are partners at Hinshaw & Culbertson LLP. The authors also wish to thank former Hinshaw & Culbertson LLP partner Thomas P McGarry and former associate Michael G Ruff for their contributions to this chapter. ^ Back to section

2 See the California non-medical professions standard of care jury instruction 600 Standard of Care: 'An [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care”. You must determine the level of skill and care that a reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses[, including [name of defendant],] who have testi?ed in this case.' CACI No. 600. ^ Back to section

3 *Wright v. Williams*, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194 (1975). ^ Back to section

4 See*Nelson v. Quarles and Brady*, LLP, 2013, IL App (1st) 123122. ^ Back to section

5 Cal. Code Civ. Proc. §340.6. ^ Back to section

6 NY CLSCPLR §214. ^ Back to section

7 NY CLSCPLR §214-a. ^ Back to section

8 735 ILCS 5/13-214.2 public accountants; 735 ILCS 5/13-214.3 attorneys; 735 ILCS 5/13-214 construction, design related to real property; 735 ILCS 5/13-214.4 insurance producers; 735 ILCS 5/13-212 physicians, hospitals, medical professions. ^ Back to section

**9** Wis. Stat. Ann. §402.725 (2016); Wis. Stat. Ann. §893.43 (2016) contracts; Wis. Stat. Ann. §893 (2016) lawyers. ^ Back to section

**10** U.S. CONST. Amend VII. ^ Back to section

**11** *Colgrove v. Battin*, 413 U.S. 149 (1973). ^ Back to section

**12** See, e.g., CA CONST. art. 1, §16. ^ Back to section

**13** California Code of Civil Procedure, CCP §631. ^ Back to section

**14** 28 U.S. Code §1332. ^ Back to section

**15** See, e.g., VA. Code §8.01-58. ^ Back to section

**16** The Illinois 51 per cent bar does not apply to legal malpractice because it applies literally to actions on account of death, bodily injury or 'physical damage to property', whereas legal malpractice is an injury to inchoate property rights. 735 ILCS 5/2-1116. ^ Back to section

**17** An example is the Illinois Tortfeasor Contribution Act, and procedure 740 ILCS 100/2. ^ Back to section

**18** Arbitration is institutional or ad hoc. Institutional arbitration is administered by a dispute resolution firm (e.g., AAA, JAMS, ADR Systems) and the arbitration is governed by the dispute resolution firm's institutional arbitration rules. Ad hoc arbitration is generally conducted without administration by a dispute resolution firm. The parties' arbitration agreement governs an ad hoc arbitration, rather than a set of institutional arbitration rules. See Gary B. Born,*International Commercial Arbitration*, §1.04[C] (2d ed. 2014). ^ Back to section

**19** American Arbitration Association, http://www.adr.org. ^ Back to section

**20** ABA Model Rule 1.8 (h)(1). ^ Back to section

**21** Rule 11 of the Federal Rules of Civil procedure is the primary example of a court sanctions rule to deter meritless lawsuits. FRCP 11. ^ Back to section

**22** See*Doe v. Roe*, 289 Ill.App.3d 116 ( 1st. Dist. 1997). ^ Back to section

**23** See http.uspto.gov/index.html. ^ Back to section

**24** The ABA Model Rules are available on their website http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. ^ Back to section

**25** In Alaska, Ohio and New Hampshire, lawyers must notify clients in writing if they have no malpractice insurance, or if their coverage is less than US$100,000 per claim and US$300,000 aggregate. Clients must also be notified if insurance coverage is terminated or if coverage drops below the US$100,000/US$300,000. South Dakota lawyers must specify on their letterhead if they have no malpractice insurance or if their coverage is less than US$100,000 per claim. https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2804/malpractice/. ^ Back to section

**26** See http://www.iardc.org/lawyersearch_expand.asp. ^ Back to section

**27** See Illinois Supreme Court Rule 722, which requires a minimum amount of insurance of US$100,000 per claim and US$250,000 annual aggregate, times the number of lawyers in the firm at the beginning of the annual policy period, provided that the firm's insurance need not exceed US$5 million per claim and US$10 million annual aggregate for limited liability registration. ^ Back to section

**28** See e.g., California: Cal Civ Code § 3333.2 ('In no action [for medical malpractice] shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)'); Kansas: K.S.A. 60-19a02; Maryland: Md. Cts. & Jud. Proc. Code Ann. § 11-108; Michigan: Mich. Comp. Laws Ann. § 600.1483; Nevada: Nev. Rev. Stat. Ann. § 41A.035; Utah Code Ann. § 78-14-7.1; W.Va. Code 55-7B-8. See also West Virginia: W. Va. Code 55-7B-8; N.J. Stat. Ann. 2A:53A-B. ^ Back to section

**29** Colorado: CO Rev Stat § 13-80-102.5 (US$300,000 non-economic damages US$1 million total damages); New Mexico: N.M. Stat. Ann. § 41-5-6 (US$600,000 cap on all damages except for past or future medical bills and US$250,000 maximum provider liability); Oregon: see*Busch v. McInnis Waste Systems*, 366 Ore. 628, 630 (2020) – (cap found unconstitutional). ^ Back to section

**30** Illinois: 735 ILCS 5/2-622. ^ Back to section

**31** Florida: Fla. Stat. § 766.106. ^ Back to section

**32** The SEC was established by the Federal Securities Exchange Act of 1934, enacted in response to the stock market crash of 1929 and the depression of the 1930s. ^ Back to section

**33** The CFTC was created by Commodity Futures Trading Commission Act of 1974, which made extensive changes to the Commodity Exchange Act (CEA) of 1936. ^ Back to section

**34** The economic loss doctrine prohibits a party 'from seeking to recover in tort for economic losses that are contractual in nature'.*Graham Constr. Servs., Inc. v. Hammer & Steel Inc.,* 755 F.3d 611, 616 (8th Cir.2014) (quoting *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 192 (Mo.Ct.App.2010). ^ Back to section

**35** See,*Ferris & Salter, P.C. v. Thomas Reuters Corp. d/b/a West Publishing Corp., d/b/a Findlaw*, 889 F.Supp.2d 1149 (2012). (A federal court held that Minnesota had no precedent and there was no persuasive argument to hold that a malpractice claim may lie against computer consultants for errors in designing and maintaining a law firm's website.); *Accord, Superior Edge, Inc. v. Monsanto Co*., 44 F.Supp.3d 890 (2014). ^ Back to section

**36** See footnote 33. ^ Back to section

**37** Raymond T. Nimmer,*The Law of Computer Tech*. (4th ed., Thomson Reuters 2012). ^ Back to section

**38** id., § 9.30. ^ Back to section

**39** In 1996 Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), Pub.L 104-91, Aug. 21, 1996, 110 Stat. 1936, which set a federal privacy floor for personally identifying information in health records. Subsequently, in 2009 Congress adopted the Health Information Technology for Economic and Clinical Health Act ('HITECH Act'), Pub.L. 111-5, Div. A, Title XIII, Div. B, Title IV, 123 Stat. 226, 447, which among other things, extended the HIPAA obligations of physicians, hospitals, group health plans and other 'covered entities' to protect PHI ('Protected Health Information') to 'Business Associates'. ^ Back to section

**40** See Gramm-Leach-Bliley Act ('GLB Act'), Pub.L. 106-102, 113 Stat. 1338. The GLB Act's Privacy Rule encompasses many businesses not typically considered 'financial institutions'. ^ Back to section

**41** See National Conference of State Legislatures (NSCL) Security Breach Notification Laws, 8 March 2020, https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx. ^ Back to section

**42** The California Consumer Privacy Act of 2019 §§1798.100 – 1798.199. ^ Back to section

**43** More Lawsuits Are Being Filed Under California's Influential Consumer Privacy Law, Jessica Mach, April 27, 2022, https://www.treasuryandrisk.com/2022/04/27/plaintiffs-are-filing-more-cases-under-californias-influential-consumer-privacy-law-411-27028/?slreturn=20220409144516. ^ Back to section

**44** See California Consumer Privacy Fact Sheet, CA Dept. of Justice, Office of the Attorney General, https://oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf. ^ Back to section

**45** The California Consumer Privacy of 2019 §1798.150. ^ Back to section

**46** California Data Breach Report 2012-2015, February 2016, https://oag.ca.gov/sites/all/files/agweb/pdfs/dbr/2016-data-breach-report.pdf; the CIS Critical Security Controls are available at https://www.cisecurity.org/controls/. ^ Back to section

**47** For example, see 225 ILCS 454/5-15; Insurance § 626.8473. ^ Back to section

**48** 225 ILCS 454/15-15(a). ^ Back to section

**49** *Dingle v. Dellinger*, 2014 Fla. App. LEXIS 4261 (Dist. Ct. App. Feb. 27, 2014). ^ Back to section

**50** Ames & Gough, 2021 Architects and Engineers Professional Liability Insurance Market Survey. ^ Back to section

**51** See footnote 33. ^ Back to section

**52** *Blake Constr. Co. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987). ^ Back to section

**53** *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl*, LLP, 451 Md. 600, 155 A.3d 445 (2017). ^ Back to section

**54** *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1200 (Del. 1992). ^ Back to section

**55** https://nasba.org/licensure/howmanycpas/. ^ Back to section

**56** SOX was a significant piece of legislation meant to address a series of accounting scandals at the turn of the 21st century, such as the Enron scandal where several executives were charged with conspiracy, insider trading and securities fraud, and which resulted in the largest bankruptcy to date. ^ Back to section

**57** SEC regulations require public companies to undergo an annual audit of their financial statements and make them publicly available to current and potential investors, among other business and financial disclosure requirements. ^ Back to section

**58** See, e.g., Illinois Public Accounting Act, 225 ILCS 450/30.1. The aim of such statutes is to limit accountant exposure to an endless class of potential third-party malpractice claimants that may review and rely on the client's financial statements. ^ Back to section

**59** Some of the other civil causes of action brought against accountants involve intentional misrepresentation or fraud, violation of the Racketeer Influenced Corrupt Organisations Act (RICO) statute, 18 U.S.C. §§1961-68,violation of §10(b) of the Securities Exchange Act of 1934, violation of state consumer protection statutes, breach of contract, and interference with business relations. ^ Back to section

**60** See*DG Liquidation, Inc. v. Anchin, Block & Anchin*, LLP, 300 A.D.2d 70, 71 (N.Y. App. 2002)('The cause of action for breach of fiduciary duty was properly dismissed since the duty owed by an accountant to a client is generally not fiduciary in nature.') ^ Back to section

**61** For example, in the State of California, the agency responsible for issuing licences is the California Department of Insurance. In the state of New York, the New York Department of Financial Services is responsible for issuing the licence. In the State of Florida, the Florida Office of Insurance Regulation issues the licence. ^ Back to section

**62** *Loyle, LLC v. Greater New York Mut. Ins. Co.*, 2017 WL 3861289 *17 (N.J. App. Sept. 5, 2017). ^ Back to section

**63** *Krumme v. Mercury Ins. Co.*, 123 Cal.App.4th 924, 928–929 (2004); Ins. Code, §§ 31, 33, 1621, 1623. ^ Back to section

**64** *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382. ^ Back to section

**65** *He v. Norris*, 415 P.3d 1219, 1221 (Wash. App. 2018); *Perreault v. AIS Affinity Ins. Agy., Ins.,* 93 Mass. App. 673 (Aug. 2, 2018). ^ Back to section

**66** *Conquest v. WMC Mortg. Corp.*, 247 F. Supp. 3d 618, 635 (E.D. Pa. Mar. 30, 2017); *Mosqueda v. Aristin Dev. Grp.*, 2018 N.Y. Slip Op 31715 (Mar. 26, 2018). ^ Back to section

**67** *Vestal v. Pontillo*, 158 App. Div. 3d 1036 (N.Y. 2018). ^ Back to section

**68** A non-exhaustive list of popular AI chatbots include: (1) Microsoft's Bing – https://www.microsoft.com/en-us/bing; (2) Jasper AI – https://www.jasper.ai/; (3) YouChat – https://you.com/search?q=who+are+you&tbm=youchat; (4) Writesonic – https://writesonic.com/chat. ^ Back to section

**69** IBM.com, 'What is a chatbot?' https://www.ibm.com/topics/chatbots#:~:text=the%20next%20step-,What%20is%20a%20chatbot%3F,337%25%20ROI%20over%20three%20years. ^ Back to section

**70** See*Mata v. Avianca, Inc.*, 1:22-cv-014161-PKC, Dkt. 54 (Opinion and Order on Sanctions). ^ Back to section

**71** The non-existent cases cited in the*Mata* response brief were *Varghese v. China Southern Airlines Co., Ltd.*, 925 F.3d 1339 (11th Cir. 2019); *Shaboon v. Egyptair*, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013); *Peterson v. Iran Air*, 905 F. Supp. 2d 121 (D.D.C. 2012); *Martinez v. Delta Airlines, Inc.*, 2019 WL 4639462 (Tex. App. Sept. 25, 2019); *Estate of Durden v. KLM Royal Dutch Airlines*, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017); *Ehrlich v. American Airlines, Inc.*, 360 N.J. Super. 360 (App. Div. 2003); *Miller v. United Airlines, Inc.*, 174 F.3d 366, 371-72 (2d Cir. 1999). See note 71, *supra, Mata*, Dkt. 54, ¶¶13, 36. ^ Back to section

**72** See note 71,*supra, Mata*, Dkt. 54, p. 1. ^ Back to section

**73** See Ryan Boysen, Law 360,*Attys in ChatGPT Fiasco Sanctioned for 'Bad Faith' Conduct* (June 22, 2023), https://www.law360.com/articles/1691963/; Benjamin Weiser and Nate Schweber, The New York Times, *The ChatGPT Lawyer Explains Himself* (June 8, 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html- ; Sara Merken, Reuters, *New York lawyers sanctioned for using fake ChatGPT cases in their legal brief* (June 26, 2023), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/. ^ Back to section

**74** https://www.txnd.uscourts.gov/judge/judge-brantley-starr. ^ Back to section

**75** Colorado: 'Colorado Privacy Act,' eff. July 1, 2023 - 2021 Colo. SB. 190; Utah: 'Utah Consumer Privacy Act,' eff. Dec. 31, 2023 - Utah Code Ann. Title 13, Ch. 61; Virginia: 'Virginia Consumer Data Protection Act,' eff. Jan. 1, 2023 - H.B. 2307 & S.B. 1392. ^ Back to section

**76** See footnote 42. ^ Back to section

**77** California Consumer Privacy Act of 2018 § 1798.150. ^ Back to section

**78** See ABA Model Rule 1.1, which requires lawyers to keep abreast of changes, benefits and risks of relevant technology. ^ Back to section

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