BPE Solicitors v Hughes-Holland: Mountaineer's knee – object lesson in negligence law

The building blocks for most claims in contract and negligence are deceptively simple - claimants must establish that they were owed a duty, that the duty holder breached that duty and that the breach caused them to suffer loss.

But, as a recent judgment of the UK Supreme Court reminds us, there is a further test. The claimant must also show that the loss suffered was within the scope of the defendant's duty.

Claimants and defendants need to be aware of this requirement and professionals should bear it in mind when giving advice to their clients. Which brings us to the mountaineer's knee...

The context

In *BPE Solicitors v Hughes-Holland*, Peter Hughes-Holland sued BPE for losses sustained after a property development into which he had injected £200,000 failed. The £200,000 loan had been documented by BPE and he entered the arrangement without full knowledge of the facts.

He had misunderstood from the borrower that the money would be used to re-fit a disused heating tower into office space, that the borrower owned the building, and that he had planning permission for the development.

In fact, the borrower would use the money primarily to refinance debt secured by the property, and the development plans exceeded the scope of the planning permission. Further funds and permission were needed for the building's development.

Using a precedent from a previous transaction, the solicitors produced documents including provisions to the effect that the loan moneys "will be made available as a contribution to the costs of development of the property" and that the purpose of the loan "was to assist with the costs of the development of the property". These statements reflected the Hughes-Holland's understanding, but not the actual structure of the transaction.

The question

At issue was whether BPE had a legal responsibility to prevent the loss claimed. This is not an easy concept to grasp, and is often mistaken as a question of factual causation, for which the basic test is "but for the defendant's breach of duty, the claimant would not have suffered the loss".

Explanation by example

This is where the mountaineer's knee comes in. In the *SAAMCO* House of Lords decision, Lord Hoffmann explained the distinction with this famous analogy:

A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

By Jeremy Upson

Factually, the doctor's negligence caused the mountaineer's injury, because the mountaineer would not have gone climbing if he knew the true state of his knee. But the doctor is not legally responsible for the mountaineer's injury, because if the doctor's advice had been correct the injury would have occurred anyway.

SAAMCO itself was about valuers who had negligently over-stated the value of properties to lenders. The application of the principle was that the valuers were responsible for the losses represented by the difference between the over-stated and true values of the properties. The valuers were not responsible, however, for losses flowing from a decline in the property market.

The decision

The Court unanimously found that BPE was not legally responsible for Hughes-Holland's losses. The judgment was written by Lord Sumption, who was counsel for one of the valuers in the *SAAMCO* case.

He said the solicitors had been instructed simply to document the transaction and were unaware of the nature of the proposed development and of the discussions between the lender and borrower.

In those circumstances, it was not the responsibility of the solicitors to advise the lender on the consequences of the transaction. It might have been different had the lender sought the solicitors' advice on whether to enter into the contract.

Take-outs

For claimants, the temptation can be to focus too heavily on the fact a duty has been breached.

The risks to reputation of exposing the breach can be a strong settlement motivator but, if they are serious about going to trial, claimants need to confront the question of whether the defendant is responsible for the claimed loss. The flip-side for defendants is to impose that discipline on claimants, as doing that effectively can reduce the quantum of acceptable settlement.

For professionals, the lesson is to be clear with clients about the scope of your advice or product, and to understand that your risk of liability for negligent work broadly correlates with the scope of that work or advice.

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