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Editorial

‘Keith Stanton and the Law of Professional Negligence’*

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Introduction

This issue of the journal takes the form of a *Festschrift* dedicated to Keith Stanton, professor of law at the University of Bristol, a leading light in the recognition and development of the law of professional negligence as a distinct legal category, and one of the founding editors of this journal. It comprises of revised versions of papers given at the seminar ‘Professional Negligence Law in the 21st Century’ at the University of Bristol Law School on 17 January 2017. The seminar was the second that the journal has sponsored since its acquisition by Bloomsbury Professional in XXXX, the first (in 2015) commemorating the 30th anniversary of the journal’s first publication.¹

The extent of Keith’s contribution to the law of professional negligence, tort law more widely, and the study of law in university in general, provides more than ample justification for the dedication of this special issue to him. He has been a member of the University of Bristol law faculty since 1973, serving for nine years over two stints as head of the law school. In 2011–12, he was president of the Society of Legal Scholars, the professional body for university law teachers in the United Kingdom. His books are indispensable works of reference in the law of tort, including *Breach of Statutory Duty in Tort* (1986), *The Modern Law of Tort* (1994) and *Statutory Torts* (co-authored, 2003). Perhaps preeminent amongst them, and certainly most pertinent for present purposes, is the remarkable book, *Professional Negligence*, that he co-wrote with Tony Dugdale, first appearing in 1981, with new editions in 1989 and 1998. Together with the identically named title by Rupert Jackson and John Powell that was first published in 1982, and now appears in its eight edition as *Jackson & Powell on Professional Liability*, it was a work that defined a new legal category. One member of this journal’s editorial board, Mark Simpson QC explained to me: ‘My generation were brought up on two books: Jackson & Powell and Dugdale & Stanton. We had to get 50 people to write the next one. That shows, I think, what a great achievement those two books were. We all owe Keith a great debt.’²

This special issue consists of articles by several of Keith’s colleagues at Bristol (Joanne Conaghan, Paula Giliker, Judy Laing, Clare Torrible and myself), and by a Bristol alumnus, Imran Benson, now a barrister. I had not initially conceived of the collection being such a Bristol dominated affair, but so many colleagues were so eager to contribute that I felt I could not deny them the opportunity, even if this filled all the available slots for the seminar. In any case, it is not entirely inappropriate to celebrate the University of Bristol’s own contribution to the history of the journal, as it was two Bristol lecturers, Keith and Tony Dugdale, who were instrumental in establishing it in 1985 in collaboration with the journal’s first publisher, Frank Cass. The Bristol theme continued in its

* I am very grateful to Keith Stanton for his generous comments on a previous version of this paper. In the interests of transparency, I should confess that he was not at all convinced by my analysis.

¹ See Issue 4 of vol 31 (2015) on ‘Vicarious Liability and Non-Delegable Duties’ (co-ordinated by Paula Giliker).

² Email to the author, January 2017, referring to M Simpson (ed), *Professional Negligence and Liability* (Informa (previously LLP), looseleaf, first published 2000).

first issue, in which three of the five articles published had authors affiliated to the Law School: Della Evans, Tony Dugdale and David Feldman. (The other authors were Stephen Todd and Michael Jones, who were both also to contribute very significantly to the journal over many years.) Incidentally, in that first issue, Keith was the only person listed as editor, though I gather from him that he performed that function jointly with Tony Dugdale, with David Allen, Jon Holyoak, Michael Jones and John Parkinson as assistant editors.

The eagle-eyed reader who has already looked at his issue's table of contents will by now have noticed that, somewhat unusually in a collection of this nature, Keith has actually contributed an article to his own *Festschrift*. The explanation is rather simple. I wanted to keep the ulterior purpose of the seminar in January a surprise for him, but to ensure his attendance—without rousing his suspicions—could think of no way of doing so other than to ask him to contribute to the event. When he offered a paper, I could hardly turn such bounty down. In consequence, this collection not only stands as a commemoration of Keith's work, but also provides further evidence of its excellence.

The rest of this editorial introduction will introduce the other papers in this issue and pick out some of the broader themes that emerge from them. But not before I take the opportunity to honour Keith in typical academic fashion—namely, by subjecting some of his well-known views to critical attack. In particular, I want to take issue with his longstanding hostility towards the concept of assumption of responsibility as a useful organising idea in the law of professional negligence. To do so, I shall need to begin with some elementary explanation of how the law of professional negligence is in fact treated as distinct from the general law of negligence and to consider whether there is any justification for doing so.

The distinctive legal character of professional negligence

The law of professional negligence may be regarded as distinct from the general law of negligence in a number of respects. The duty of care it imposes on the professional goes beyond what the law generally requires insofar as it entails obligations of an affirmative and not merely negative character—that is, to confer a positive benefit on the client and not merely to avoid causing harm. Exceptionally, this duty extends to the client's purely economic interests, so the scope of protection of the duty is also more extensive than in negligence generally. The law of professional negligence also demands a distinct standard of care, higher than that owed by others, based on the express or implied undertaking to apply the competence or skill expected of a professional.

Admittedly, some writers dispute the proposition that professionals are judged against a distinct standard of care, higher than that owed by others. To them, there is only one standard—the standard of reasonable care;³ it is only its practical content that varies, reflecting the task undertaken.⁴ Yet, there is substantial case authority in favour of a variable standard. An amateur carpenter is not to be judged by the higher standard appropriately applied to a professional carpenter working for reward.⁵ A jeweller performing an ear-piercing is judged more leniently than if the same procedure were undertaken by a surgeon.⁶ Even different groups within a single profession may be subject to different standards of care: a general medical practitioner conducting an examination need not demonstrate the same degree of competence and skill that would be

³ AM Dugdale and KM Stanton, *Professional Negligence* (3rd edn, 1998), para 5.05.

⁴ *Ibid*, para 5.16.

⁵ *Wells v Cooper* [1958] 2 QB 265 (CA) at 271, *per* Jenkins LJ.

⁶ *Philips v Whiteley (William) Ltd* [1938] 1 All ER 566, *per* Goddard J.

demanding of a specialist consultant.⁷ Academic commentary also generally favours this view,⁸ though it should be noted that this is not to cast doubt on the proposition that the law of negligence sets minimum standards of reasonable conduct applicable to different activities: the point is only that the law may impose a higher standard on professionals and others who hold themselves out as possessing particular skill, even in respect of activities that need not be performed with such skill by others.

These distinctions between the law of professional negligence and the law of negligence generally cannot be explained simply on the basis that the professional's duty of care is contractual. It is well established that the professional's duty arises *concurrently* under the contractual retainer and in the law of tort. In such a case, the client can choose whichever cause of action is the more advantageous (for example, on limitation grounds).⁹ If there is no contract, the claim in tort assumes even greater significance. It may be available where there is no client relationship (for example, where information is provided in the interests of another person who is a client)¹⁰ or where there is no contract with a client because of a lack of consideration (for example, where the professional provides services free of charge in the expectation of future remunerative work).¹¹ The tort remedy may also avail third parties, who may be able to bring a claim even though not able to sue on the retainer.¹²

To the extent that the law of professional negligence is distinctive, that often works to the advantage of the client and others able to sue on the professional's duty of care. But it can also cut the other way, as the professional may be afforded a protection from liability that is not available to the world at large. As is well known, the *Bolam* test entails a degree of judicial deference to professional standards, meaning that compliance with even a minority practice is not to be regarded as negligent provided it is founded on a responsible body of professional opinion that has a logical basis.¹³ It is immaterial that the court has a preference for a different body of opinion.¹⁴

Justifying distinct rules of professional negligence

Why special liability rules are applied to professionals is not self-evident and requires justification. Perhaps surprisingly, this is not a matter that has so far generated a substantial literature.¹⁵

Part of the rationale for treating professional negligence as distinct may be found in how professional status is defined. Though some legal writers treat it as 'self-evident' what is a profession and what is not,¹⁶ others seek to identify typical traits, characteristics or hallmarks of professionalism. Thus, one leading practitioners' work highlights the following: the skilled and specialised nature of professional work; the moral commitment of practitioners to high standards

⁷ Cf *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 (HL) at 638, *per* Lord Scarman ('a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality').

⁸ See eg P Giliker, *Torts* (5th edn, Sweet & Maxwell, 2014) § 5-022; WE Peel & J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell, 2014) § 6-011; and note also, in the very first issue of this journal, Holyoak 'Standard of care—Thrice more unto the breach' (1985) 1 PN 33.

⁹ *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145.

¹⁰ *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465.

¹¹ *Burgess v Lejonvarn* [2017] EWCA Civ 254.

¹² See eg *White v Jones* [1995] 2 AC 207.

¹³ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, as interpreted in *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL).

¹⁴ *Maynard*, *supra* n 7 at 638, *per* Lord Scarman.

¹⁵ But see Jackson LJ 'The Professions: Power, Privilege and Legal Liability' (2015) 31 PN 122.

¹⁶ *Ibid* at 123, commenting on the approach in Dugdale and Stanton (*supra* n 3).

and their duty to the public at large, not just their client; the role of professional associations in regulating admission to the profession and upholding standards; and the high status accorded to professionals, involving privileges granted by Parliament or by common consent.¹⁷ Sociologists have produced comparable lists.¹⁸ Yet it is not clear that all these considerations bear *normative significance* in the present context—that is, that they provide or contribute to a justification for the application to professionals of rules of negligence liability distinct from those that are generally applicable.¹⁹

It is proposed here that two countervailing considerations have played the largest role in the development of a distinct law of professional negligence. On the one hand, the assumption of professional status constitutes an invitation to persons generally to place trust in the application for their benefit of the special competence and skill that the profession claims to possess. Professional status is a socially useful institution that facilitates access to expert advice and opinion for those that desire to have it. It serves as a ‘kite mark’ of quality and signals an ethical commitment that overrides the economic self-interest inherent in normal commercial transactions. By recognising professional status and according specific consequences to it, the law supports the institution and encourages trust in it. Those who rely on the institution are, for that reason, *prima facie* entitled to the law’s assistance in the provision of suitable remedies if they suffer detriment because the professional service is negligently performed.²⁰

On the other hand, professional status also involves the claim to a set of particular privileges, traditionally including self-regulation and monopoly rights over the provision of certain services. The aforementioned *Bolam* test can be seen in this light as signalling judicial deference to the ability of the professions to set their own standards of proper conduct. Yet it is also possible to see the set of professional privileges as providing a further reason for recognising a liability on professionals that is distinct in a variety of respects from the ordinary liability for negligence: it is fair to enforce the responsibility assumed by the professional through the application of liability rules as the *quid pro quo* for the privileges from which the professional benefits.

The legal concept of assumption of responsibility

Insofar as the invocation of professional status provides a justification for the imposition on professionals of distinct liabilities, the legal mechanism for doing so is the concept of assumption of responsibility. This provides a legal basis not only for the higher standard of care owed by professional persons but also for the wider scope of their duty of care (specifically, insofar as it protects purely financial interests) and its affirmative content. Under the law of non-delegable duties, the assumption of responsibility may also entail a duty to ensure that tasks undertaken for

¹⁷ *Jackson & Powell on Professional Liability* (7th edn, Sweet & Maxwell, 2012) para 1-005. See also McGrath ‘Professional Liability’ in Oliphant, K (ed) *The Law of Tort* (3rd edn, LexisNexis, 2015) para 16.1.

¹⁸ See eg TJ Johnson *Professions and Power* (Macmillan, 1972) 23–32, discussing ‘trait’ models of professionalism, which he contrasts with ‘functionalist’ models.

¹⁹ In other contexts, of course, other factors may be relevant and ‘the professional’ may be differently defined, eg in connection with tax law (see eg *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647; *Neild v Inland Revenue Commissioners (No 2)* [1948] 2 All ER 1071) or the international recognition of professional qualifications (see Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications).

²⁰ These ideas were influenced by the theories of promises propounded by Raz (‘Promises in Morality and Law’ (1981) 95 Harv L Rev 916) and more recently by Friedrich and Southwood (‘Promises and Trust’, in Sheinman, H (ed) *Promises and Agreement: Philosophical Essays* (Oxford University Press, 2011)). I leave it to others to decide to what extent, if at all, the account in the text is consistent with those theories.

another's benefit are performed with reasonable care, even when the task (though not the responsibility) is delegated to another, as is explored further in Giliker's contribution to this special issue.²¹

It must, however, be conceded that Stanton and other respected commentators have expressed sustained and powerful criticism of the concept of assumption of responsibility, arguing that it lacks utility—being used merely in conclusory fashion as a label to attach to situations where there is a duty of care of the relevant scope²²--and merely obscures the considerations of policy or principle that are truly decisive in particular contexts.²³ From this perspective, it is a fiction to regard the responsibility as voluntarily *assumed* rather than *imposed* by law. In Stanton's view, the focus of inquiry should instead be on the specific 'pockets' of liability recognised by the courts in respect of particular professions and their incremental development in light of the policies to which the courts give effect within each pocket.²⁴

Despite this academic criticism of the concept, the courts have long regarded assumption of responsibility as central to the law of professional negligence and continue to recognise it as such. The idea was crucial to the recognition in principle of a tortious duty of care in respect of pure economic loss in *Hedley Byrne v Heller*.²⁵ It has since been recognised as 'the governing principle' in determining whether a *Hedley Byrne* duty arises.²⁶ Though Stanton has written that the concept was 'fatally damaged' by the decision in *Customs and Excise Commissioners v Barclays Bank plc*,²⁷ the House of Lords in that case actually made explicit acknowledgement of the concept's continuing utility.²⁸ Such critical remarks as were made there and in other cases have mostly been directed at certain alleged implications of the assumption of responsibility analysis—that there has to be a conscious acceptance of a legal duty by the defendant²⁹ or that assumption of responsibility is the *exclusive* basis for a duty of care extending to pure economic loss³⁰—and do not warrant rejection of the concept altogether. Indeed, Jackson LJ has subsequently re-affirmed its centrality in our present context: 'In my view, the conceptual basis upon which the concurrent liability of professional persons in tort to their clients now rests is assumption of responsibility.'³¹

I will also admit to having reservations about Stanton's preferred approach based on the identification and incremental development of 'pockets' of liability in the light of specific policy considerations. The problem with this alternative is that it gives no *justification* for the recognition of the duties of care whose breach leads to liability or for the various restrictions on their scope. It fails

²¹ Giliker, 'Non-delegable duties and institutional liability for the negligence of hospital staff: Fair, just and reasonable?', this issue.

²² Kit Barker 'Wielding Occam's Razor: Pruning Strategies for Economic Loss' (2006) 26 OJLS 289; Keith Stanton 'Professional negligence: duty of care methodology in the twenty first century' (2006) 22 PN 134; Andrew Robertson and Julia Wang 'The Assumption of Responsibility' in Barker, K, Grantham, R, and Swain, W (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart, 2015)

²³ Kit Barker 'Unreliable assumptions in the modern law of negligence' (1993) 109 LQR 461.

²⁴ Stanton, *supra* n 22 at 149–50; Stanton, 'Defining the duty of care for bank references' (2016) 22 PN 272 at 275.

²⁵ *Supra* n 10, especially at 486, *per* Lord Reid, and 529, *per* Lord Devlin.

²⁶ *Henderson v Merrett*, *supra* n 9 at 178, *per* Lord Goff.

²⁷ Stanton, *supra* n 22 at 149, referring to *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181. See also Stanton, *supra* n 24 at 274 ('buried').

²⁸ *Supra* n 27 at [4], *per* Lord Bingham ('a sufficient but not a necessary condition of liability'), at [35] *per* Lord Hoffmann ('useful guidance'), at [52] *per* Lord Rodger ('very real value'), and at [83] *per* Lord Mance ('on any view a core area of liability for economic loss').

²⁹ *Smith v Eric S Bush* [1990] 1 AC 831 at 862, *per* Lord Griffiths; *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 637, *per* Lord Oliver.

³⁰ *Customs and Excise v Barclays*, *supra* n 27.

³¹ *Robinson v PE Jones* [2012] QB 44 at [74].

to provide a rational explanation for the specific aspects of the professional's duty that make it distinctive. Why is it, when there is generally no liability in English law for negligent omissions, that the professional must take affirmative steps for the benefit of clients and others? Why is it, when English tort law generally excludes negligence liability for pure economic loss, that the professional's duty extends to the latter's purely financial interests? A complete analysis of the professional's duty should account for its exceptional scope, which goes significantly further than the duty of care owed under orthodox general principles of the law of negligence. It ought also to account for the limits imposed on those to whom the professional owes the duty—not the world at large (like tort duties generally, subject to a requirement of reasonable foreseeability) but only the client and specific third parties.

The concept of voluntary assumption of responsibility provides the requisite justification.³² The professional's duty of care is more extensive than that of persons generally—insofar as it has affirmative content and requires the professional to take reasonable care of the latter's purely financial interests—precisely because that more extensive responsibility is voluntarily assumed through the invocation of professional status. Conversely, the protective scope of that duty is more limited than that of the duty of care arising under *Donoghue v Stevenson*³³—because it is owed only to the client, and/or (exceptionally) to a third party, and not to the world at large—and this is, again, precisely because it rests on the professional's assumption of responsibility towards particular persons.

Three specific objections to this approach may be considered. First, it may be objected that the responsibility placed on the professional is ultimately a question of law and not of the professional's intentions. That is true, and has received judicial acknowledgement on many occasions.³⁴ The legal concept of assumption of responsibility is objective.³⁵ Consequently, 'the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case'.³⁶ But that is the same approach as is adopted in the case of contractual liability,³⁷ and provides no more reason to doubt the utility of assumption of responsibility in the law of tort than that of agreement in the law of contract. There is no inconsistency in saying that responsibility may be assumed in law notwithstanding a purported refusal to accept any responsibility at all.³⁸ Nor that the obligations assumed may be prescribed by statute. Many professions are now heavily regulated and the duties on them are often predominately statutory, as Stanton's own contribution to this collection illuminates with his customary clarity in the context of the mis-selling of financial products by banks and investment advisers. As he observes, breach of such duties may result in liabilities that are quite remarkable in terms of common law principle, as they involve strict liability for pure economic loss,³⁹ but it seems to me that they can be justified as a reasonable incident of the professional status assumed by those providing financial advice.

³² See also R Stevens *Torts and Rights* (2007) 9–14 and 33–37.

³³ [1932] AC 562.

³⁴ *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 654, per Lord Slynn; *Customs and Excise v Barclays*, supra n 27 at [35], per Lord Hoffmann.

³⁵ *Henderson v Merrett*, supra n 9 at 181, per Lord Goff; *Phelps*, supra n 34 at 654, per Lord Slynn; *Customs and Excise v Barclays*, supra n 27 at [5], per Lord Bingham, and at [73], per Lord Walker.

³⁶ *Customs and Excise v Barclays*, supra n 27 at [36], per Lord Hoffmann.

³⁷ *Ibid* at [35], per Lord Hoffmann. As to the law of contract, see especially *Smith v Hughes* (1871) LR 6 QB 597.

³⁸ *Smith v Bush*, supra n 29.

³⁹ Stanton, 'Investment Advice: the Statutory Remedy', this issue.

Second, there is the risk that the concept of assumption of responsibility might be stretched beyond its proper limits.⁴⁰ To say that a professional assumes responsibility to a client to take care of their financial interests would then become ‘little different from saying that a manufacturer of ginger beer assumes a responsibility to consumers to take care to keep snails out of his bottles.’⁴¹ Yet, in my opinion, there is a *substantial* difference between the two situations because the manufacturer of ginger beer only owes a duty to be careful not to cause harm, and not a duty to confer a positive benefit, and in so doing need only take account of the interests of others in their person and property, and not their purely economic interests. Further, the manufacturer owes this duty to all those who might foreseeably suffer harm if the duty is neglected, not just to a limited class of persons (those to whom responsibility is assumed). The reason why the two situations are not always distinguished clearly is that it came to be said that, since the defendant need not consciously assume legal liability, what must therefore be assumed is responsibility for the task undertaken.⁴² Yet this fails to account for the exceptional nature of the professional’s duty (its affirmative content and extension to purely economic interests) or the special position—relative to the world at large—of the person *for whom* the task is performed and *to whom* the duty is owed. The assumption of responsibility analysis provides a rational explanation for these features of the professional’s duty and so serves to distinguish it from the duty of care arising under orthodox *Donoghue v Stevenson* principles.⁴³

Third, the assumption of responsibility analysis has been portrayed as ‘a smokescreen of meaningless jargon’ that hides the important questions the court must address in deciding whether the professional owes the claimant a duty of care.⁴⁴ I admit that this is a risk—but it is not an inevitable consequence of using the assumption of responsibility analysis. In most cases, the tort duty will coexist alongside the contractual obligations in the retainer, and the question of what responsibility the professional assumes (tort) is answered by ascertaining what it was that the professional agreed (contract). Liability in such a case is concurrent in contract and tort.⁴⁵ What was agreed by the parties may also be decisive even if there was no contract because the professional services were performed gratuitously.⁴⁶ It is only where we are faced with a claimant who has no direct dealings with the professional, and is a third party to the contract of retainer (if there is one), that we have to go beyond the interpretative exercise of ascertaining the parties’ agreement and exercise a normative judgment about the scope of the responsibility assumed (if any). Here, the concept of assumption of responsibility loses its explanatory force and I agree entirely with Stanton that it is necessary to engage in a nuanced exploration of the factual context so as to identify more specific considerations that allow the principled development of the law in the light of relevant policy considerations.⁴⁷ Yet too often surrogate factors of this nature are themselves so loosely

⁴⁰ *Ibid* at [52], *per* Lord Rodger, and at [94], *per* Lord Mance.

⁴¹ *Ibid* at [37], *per* Lord Hoffmann.

⁴² *White v Jones*, *supra* n 12 at 273, *per* Lord Browne-Wilkinson. See also *Customs and Excise v Barclays*, *supra* n 27 at [93] *per* Lord Mance.

⁴³ See also A Mullis and K Oliphant, *Torts* (4th edn, 2011) § 5.4.1, suggesting that mutuality of relations between claimant and defendant may be a crucial consideration. As to mutuality, see further *White v Jones*, *supra* n 12 at 283, *per* Lord Mustill.

⁴⁴ Stanton, *supra* n 24 at 275.

⁴⁵ *Robinson v Jones*, *supra* n 31 at [74], *per* Jackson LJ.

⁴⁶ *Burgess v Lejonvarn*, *supra* n 11.

⁴⁷ Stanton, *supra* n 24 at 274 (‘It is far more helpful to make an attempt to unpack the factual matrix which underlies the decisions which have been reached on this subject and to plot a way forward on the basis of what is found’).

formulated and inconsistently applied that they provide no further clarity, and Stanton's own efforts to tie down the meaning of key terms deserve to be enthusiastically applauded.⁴⁸

I do not, however, regard Stanton's approach—based on the detailed and context-sensitive analysis of individual cases—as inconsistent with the view that the professional's duty of care is at a fundamental level based on an assumption of responsibility. Quite the opposite. The degree of normative judgement involved in determining the scope of the professional's responsibility is something that calls for justification, and that is what the concept provides. It explains why—by way of exception to the general approach of English law—the professional has tortious obligations of an affirmative nature regarding the purely financial interests of other persons, *and* why such obligations are owed to a strictly limited class and not to all those who might foreseeably suffer detriment from their negligent performance. The professional's invocation of professional status provides the reason for recognising these obligations, independently of the law of contract, and in appropriate cases for extending their benefit to third parties to the retainer, or even in the absence of any retainer at all.⁴⁹ Without a justification of this nature, we are thrown back on the empty formulas of 'proximity' and 'fairness, justice and reasonableness' which neither provide any rationale for the exceptional nature of the professional's duty nor give useful guidance as to its application.

The Law of Professional Negligence in Flux

Whether or not one accepts the argument above, it may nevertheless be agreed that the lack of conceptual clarity about the legal basis of the professional's duty of care has contributed to a degree of instability in the law of professional negligence, which has been increased by changing conceptions of what professional status means in the contemporary world. A number of developments may be highlighted, serving as an introduction to the other contributions to this special issue.

First, there has been a steady erosion of professional 'privileges' and the increased exposure of the professions to competitive market forces. This has been perhaps particularly evident in respect of the legal profession, with the relaxation of barriers to entry to the practice of law and of restrictions on business forms (so as to allow limited liability partnerships and alternative business structures) and external ownership. This increased competition is accentuated as new, unregulated or less regulated players enter the market.⁵⁰ There is also a de-regulation of the professional-client relationship, including restrictions on the permitted forms of remuneration (eg to allow no win, no fee agreements or even US-style contingency fees (damages based agreements)), again with the aim of promoting competition.⁵¹ Yet, at the same time as there has been de-regulation of the markets in which professionals operate, the content of the professional's duty has in some areas been subjected to new and more prescriptive regulation by statute, as Stanton's contribution to this

⁴⁸ See in particular his exemplary analysis of the extent to which a third party must be 'identified' or 'identifiable' under the test proposed in *Caparo* (*supra* n 29): Stanton, '*Hedley Byrne v Heller*: the relationship factor' (2007) 23 PN 94.

⁴⁹ I do not mean by this formulation to exclude the possibility that analogous obligations might be imposed on non-professionals—just that the invocation of professional status provides a 'short cut' mechanism for imposing these obligations on a professional.

⁵⁰ See further R Abel, *English Lawyers between Market and State: The Politics of Professionalism* (OUP, 2004); R Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System', in Quill, E, and Friel, RJ (eds), *Damages and Compensation Culture: Comparative Perspectives* (Hart Publishing, 2016) at 42–51.

⁵¹ See generally Morris, 'Deconstructing Policy on Costs and the Compensation Culture', *ibid.*

collection illustrates in the context of the statutory obligations placed on banks and investment advisors, and the statutory liabilities to which they are subject.⁵²

A parallel issue is whether *the common law* should recognise new obligations incidental to professional status. A topical area considered here by Giliker is the extension to professionals of the non-delegable duties analysed recently by the Supreme Court in *Woodland v Essex County Council*.⁵³ Giliker's specific concern is the application of the theory to the liability of hospitals in claims for clinical negligence, which she supports as a justified development in light of increasing institutional out-sourcing, including the engagement of private sector providers to deliver NHS care, which raises the risk of discrimination between those in the private and public sector.⁵⁴

Further, as the professions lose more and more of their privileges, questions arise about the privileged position of professionals in other contexts. In this special issue, Benson considers whether lawyers who provide their services on a conditional or contingency fee basis, and to that extent may be regarded as litigation funders, should continue to occupy a privileged position relative to professional litigation funders, who may be liable for costs if the claim they support should fail. His conclusion, though, is not that the lawyers should lose their 'immunity', but that it should be extended to litigation funders generally.⁵⁵

A second development is the general perception that there has been a 'decline of professionalism'⁵⁶ with an alleged fall in professional standards. Deregulation and the overriding emphasis on business efficiency are seen as threats to the quality of professional services and the established ethical values of the professions. This is accompanied by increased public scepticism towards professional authority⁵⁷ and 'expertise' in general.⁵⁸ Perhaps as a manifestation of such attitudes, the deference that the courts have traditionally shown towards the exercise of professional judgement is much less marked than before. Previously, the well-known *Bolam* test⁵⁹ might be seen as entailing the courts' delegation to the professions themselves of the responsibility for setting required standards of professional conduct.⁶⁰ But the professions are now subject to more robust regulation through common law liability rules than ever before. In this context, Laing's contribution to this special issue discusses the Supreme Court's recent decision in *Montgomery v Lanarkshire Health Board*,⁶¹ deciding that the *Bolam* test should no longer be applied to the doctor's duty to advise the patient of treatment risks. The doctor's advice duty is now to be assessed by a test of 'materiality': would a reasonable person in the patient's position be likely to attach significance to the risk, or is it (or ought it to be) known that the particular patient would be likely to attach significance to it? Laing acknowledges the boost that the decision gives to patient autonomy, but calls into question whether an already stretched health service can adequately meet the demands newly imposed by the Supreme Court. It should also be noted that the implications of the

⁵² *Supra* n 39.

⁵³ [2013] UKSC 66, [2014] AC 537.

⁵⁴ *Supra* n 21.

⁵⁵ Benson, 'Liabilities of Litigation Funders', this issue.

⁵⁶ See, with a particular focus on lawyers, Burger 'The decline of professionalism' (1995) 63 Fordham L Rev 949; Rhodes 'The Professionalism Problem' (1998) 39 Wm & Mary L Rev 283 at 297–303.

⁵⁷ Pfadenhauer 'Crisis or Decline? Problems of Legitimation and Loss of Trust in Modern Professionalism' (2006) 54 Current Sociology 565.

⁵⁸ Notoriously, in the run-up to the Brexit referendum, the then Minister for Justice and Lord Chancellor, Michael Gove MP, remarked: 'people in this country have had enough of experts' (Henry Mance, 'Britain has had enough of experts, says Gove', *Financial Times*, 3 June 2016).

⁵⁹ *Supra* n 13.

⁶⁰ Cf Jackson, *supra* n 15 at 133: 'The effect of *Bolam* is that, save in exceptional circumstances, each profession sets the standards by which its members are judged.'

⁶¹ [2015] UKSC 11, [2015] AC 1430.

decision are not limited to the medical area: as Stanton discusses in his own article, the decision has already been applied in other professional contexts, with significant implications.⁶²

Lastly, there have been concerted efforts on the part of various occupational groups not traditionally regarded as 'professional' to acquire professional status.⁶³ Passing over for now the issue of whether this may result in a dilution of what it means to be a professional and a loss of esteem, the question arises of whether the acquisition of such status impacts upon the liabilities to which the occupational group concerned is subject? In this special issue, the topic is pursued by Conaghan and Torrible with particular reference to the negligence liability of the police. Their conclusion is that the recently observable shift towards viewing policing as a profession adds further weight to arguments in favour of recognising a duty of care in relation to the core police functions of suppressing and investigating crime, at least in some instances.⁶⁴

Conclusion

How changing ideas of professionalism have impacted and should impact on the law is a difficult question to which there are no unequivocal answers. Professionals still claim the possession of special competence and skill, but the claim lacks the exclusivity of old as competitors profess the same abilities and potential clients are less inclined to believe that the professional's work is worth the money being charged for it. The set of professional privileges is constantly reduced as the state seeks to regulate more and more aspects of the services supplied and insists on the dismantling of barriers to competition. Such developments place in doubt the justification for subjecting professionals to special liability rules.⁶⁵ But it is too early to suggest that the law of professional negligence will cease to exist as a distinct legal category. It is probably safest to conclude that there remains *some* justification for treating professionals as subject to special liability rules, but it is becoming increasingly difficult to distinguish their position from that of other occupational groups that claim the same competence and skill and invite trust in their performance of the same services, albeit without the same privileges that are granted to the corresponding profession. As these privileges dwindle further, we may anticipate a measure of assimilation in the liability rules applied to professional and non-professional groups competing in the provision of the same services, albeit with scope for differentiation to the extent that the competence and skill professed are of different degrees.

The papers in this collection offer convincing testimony to the fast pace of legal change in this area, highlighting particular developments of broad significance. I and the other contributors hope that they will be considered a fitting tribute to the enormous contribution over more than 30 years that Keith Stanton has made to the law of professional negligence. I am pretty sure that he will not agree with everything that we have written, but I would like to think he will enjoy reading it.

⁶² *Supra* n 39.

⁶³ See especially Wilensky, 'The Professionalization of Everyone?' (1964) 70 *Am J Sociology* 137; Evetts, 'The Sociological Analysis of Professionalism: Occupational Change in the Modern World' (2003) 18 *Int'l Sociology* 395.

⁶⁴ Conaghan and Torrible, 'Policing, Professionalism and Liability for Negligence', this issue.

⁶⁵ Cf Jackson, *supra* n 15 at 138: 'We may therefore be approaching the position that there is no discrete body of law on "professional negligence" or "professional liability" at all.' See also Stanton 'The Decline of Tort Liability for Professional Negligence' (1991) 44 *CLP* 83.

