

THE PROFESSIONAL
NEGLIGENCE
LAW REVIEW

SECOND EDITION

Editor
Nicholas Bird

THE LAWREVIEWS

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PREFACE

This second edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in 15 jurisdictions. I am delighted that we have enlarged the number of jurisdictions covered adding substantial chapters dealing with Russia, Norway, Switzerland and Austria. *The Professional Negligence Law Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders who are concerned with the liability and regulatory issues of professionals across the globe. It is published at a time when we continue to face an unusual level of political and economic turbulence and liability and regulatory risks for professional firms are increasingly global concerns.

In my own jurisdiction we highlight the ongoing work that professional firms face implementing the European General Data Protection Regulation. Its extraterritorial reach means that most international firms across the world will have to have policies in relation to it. We are now in our second year and seeing enforcement action. The first of these in the UK was by the ICO against a firm based outside the EU in Canada. Large fines have been levied by other European authorities against significant commercial entities. We also highlight a substantial change in the way that disclosure is dealt with in our business and property courts. Practitioners here have been grappling with that since 1 January 2019.

You will see similarly significant developments in all of the other jurisdictions. This second edition is the product of the skill and knowledge of leading practitioners in those 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 of 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 especially like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparation the chapter on England and Wales, and to Bryony Howe in particular. Finally, the team at Law Business Research has managed this production of this second edition with passion and great care. I am very grateful to all of them.

Nicholas Bird

Reynolds Porter Chamberlain LLP
London
June 2019

AUSTRIA

*Katrin Hanschitz and Sona Tsaturyan*¹

I INTRODUCTION

i Legal framework

Background – organisation of professions in Austria

Professions in Austria are, to a large extent, organised in autonomous, self-administered chambers with compulsory membership. These chambers generally not only decide on admission to the profession, they also monitor professional conduct and administer disciplinary sanctions, issue professional codes of conduct and fee guidelines, organise professional liability insurance and often also provide fora for alternative dispute resolution.

General legal framework for damages claims

The fundamental legal framework for professional liability in Austria is found in Section 1295 et seq. of the Austrian Civil Code, which are complemented by various regulatory provisions and professional codes of conduct and by the rules on due contractual performance and warranty.

The four prerequisites for damages claims under Austrian law are: (1) occurrence of damage; (2) causation; (3) wrongfulness or unlawfulness; and (4) fault.

Professional liability cases predominantly revolve around contractual liability. However, in particular in the areas of construction and malpractice, damages claims against professionals may be based on tort law. The main differences between tortious and contractual liability are:

- a* under tort law liability, the plaintiff is generally not able to recover pure economic losses (i.e., pecuniary damage not connected to the violation of an absolutely protected right such as life, liberty and property), whereas contractual parties are generally also liable for pure economic loss;
- b* agents' actions are fully attributable to the principal in contractual cases; in contrast, for tort claims, the principal is only liable for its agents' actions if he or she knowingly employed an unfit person or knowingly makes use of a dangerous person; and
- c* in tort law, a plaintiff must prove the defendant's fault whereas in contract law the law presumes that the defendant was at fault. It is up to the defendant to prove otherwise.

Since the standard for tort claims is much more restrictive than for contractual liability, initiating a successful professional negligence claims based solely on tort can be difficult. To bridge this gap, case law has extended the rules on contractual liability to certain third

¹ Katrin Hanschitz is a partner and Sona Tsaturyan is an associate at KNOETZL.

parties that are affected by the professional's performance of a contract (i.e., 'contract with protective effect to third parties');² this is particularly relevant for auditors and construction professionals.

Additionally, violation of 'protective laws' (i.e., laws designed to protect certain persons and assets from harm) leads to a reversal of the burden of proof outside contractual relationships and may entail liability for pure economic loss. The pertinent protective laws are generally specific to each profession, including, for example, the rules on auditing a company (protecting creditors and investors), rules on securing construction sites (protecting workers, passers-by, tenants etc.), fraud and criminal breach of fiduciary duty.

Core provisions for professional negligence

The core provision specifically governing professional liability is Section 1299 of the Civil Code, which provides that professionals are held to an increased and objective standard of diligence and care. While the general standard of care is that what is required of an average reasonable person, professionals are held to the abilities and standards of performance of their respective occupational group. Accordingly, a higher degree of diligence is required, for instance, from a specialist doctor than from a general physician.

When assessing who qualifies as a professional under Section 1299 of the Civil Code, Austrian courts take a very broad approach and include anyone acting as if they had certain qualifications, regardless of whether they are actually experts and have the respective qualification.³ Besides actual trained experts, this also includes trainees who are not (yet) fully qualified, for example, associates in law firms.

In addition to general contractual liability, pursuant to Section 1300 of the Civil Code, bad advice given negligently 'for a consideration' leads to liability, whereas advice given as a favour establishes additional liability for pure economic loss only if it is knowingly wrong. Advice is deemed to have been given 'for a consideration' if it was provided within the framework of a special contractual or legal relationship or for any reason other than a purely altruistic reason.⁴ For example, the Arbitration Board of the Medical Chamber in Austria, which offers dispute resolution services free of charge, was held liable for failing to point out a special statute of limitation in a leaflet it had published because its actions serve the interests of the medical profession, in particular by promoting trust and avoiding (criminal) court cases.⁵

Defences

Common defences against professional liability claims include time-bar, contributory negligence of the plaintiff and the failure to mitigate damages, as well as procedural objections (in particular, jurisdiction and standing) and objections regarding the value of the claim.

2 'Vertrag mit Schutzwirkung zugunsten Dritter'.

3 Austrian Supreme Court, decision of 2 December 1970, docket No. 6 Ob 282/70.

4 Austrian Supreme Court, decision of 24 January 2008, docket No. 6 Ob 104/06x.

5 Austrian Supreme Court, decision of 27 March 1995, docket No. 1 Ob 44/94.

ii Limitation

Damages claims generally become time-barred three years from the time the damage, the damaging party and the causality became known to the injured party (or would have become known to them if it had undertaken due investigations). In certain areas, specific limitation periods apply (e.g., for auditors).

The absolute limitation period is 30 years, regardless of whether the injured party had this knowledge or not. If the damage was based on a criminal action with intent that is sanctioned by a prison sentence of one year or more, the limitation period is also extended to 30 years, regardless of when the injured party obtained such knowledge. In the context of professional negligence, the most relevant crimes are fraud and criminal breach of fiduciary duties.

The claim has to be filed in court before the end of the limitation period. The limitation period may be interrupted by settlement talks. It is common for parties in settlement discussions to agree to waive the time-bar defence for the duration of the time spent in settlement talks.

iii Dispute fora and resolution

Although many of the professional chambers provide fora for dispute resolution, these are in general voluntary. To the extent damages claims are disputed and cannot be settled with the involvement of the insurance professionals, they are generally adjudicated by the civil and commercial courts. Where criminal investigations are pending, the damaged party may also request a judgment on damages claims from the criminal court in ancillary proceedings; however, in professional liability cases, criminal courts generally refer the claimants back to the civil courts for judgment on damages.

The amount claimed and the legal nature of the claim define which type of Austrian court has jurisdiction. District courts are generally competent to hear claims of an amount up to €15,000. Claims exceeding an amount of €15,000 are generally heard by regional courts. If, broadly speaking, the dispute is commercial in nature, the commercial courts have jurisdiction rather than the general district and regional courts.

Civil proceedings are governed by the Austrian Procedural Code and are mainly oral. Witnesses are first examined by the court, with additional questions from counsel and cross-examination by opposing counsel; there are no written witness statements. Although there is no discovery, there is some – limited – scope for the court to order parties to produce documents.

Professional negligence cases often turn on expert witness opinions. These expert witnesses are appointed by the court and serve to replace the judge's lack of expertise in the relevant areas. The court will generally rely on the expert witness' opinion, unless this is seriously undermined by counsel's challenges.

The 'loser pays' principle applies, namely the defeated party bears not only its own costs, but also the costs incurred by the successful party, including legal fees pursuant to a tariff, court fees and advances paid to the court for experts and translators.

iv Remedies and loss

The basic principle of compensation is the restoration of the previous condition as if no damage ever occurred (*restitutio in integrum*). If, as is often the case in professional negligence cases, restoration is not possible or feasible, monetary compensation is due.

In the context of contractual liability, positive interest (performance) may be claimed for failure of due performance of a valid contract. In cases where the damaged party relied on information given by the other party, negative interest becomes due, that is, so that the damaged party is in the position it would have been if it had not relied on these disclosures (generally frustrated expenses and disadvantages caused by missing alternative opportunities).

Loss of profit is generally only due in cases of gross negligence, unless contractually otherwise agreed; the burden of proof for gross negligence lies with the plaintiff.

Benefits obtained by the damaged party as a result of the damaging occurrence, such as social security benefits, may reduce liability, depending on their nature and purpose.

Austrian civil law differentiates between material and non-material damages. Material damages can be quantified (e.g., property damages). Non-material damages, on the other hand, generally cannot and, therefore, require a quantification process. An example is compensation for pain suffered by the injured person as a result of the injury: usually, 'day rates' are used, which are classified into mild, moderate and severe pain. The number of day rates results from the duration and intensity of the pain, which are usually determined by experts.

In the context of professional negligence, damages claims are often contractually modified; restrictions for permissible limitations apply in particular in relation to consumers, to liability for physical harm and for crass gross negligence and intent.

II SPECIFIC PROFESSIONS

i Lawyers

Access to the profession and conduct of the profession is governed by the Austrian Lawyers' Act, the lawyer's professional code of conduct, the Civil Code and the lawyer's Disciplinary Statute. Membership to the respective regional bar association is compulsory.

Every lawyer is obliged to obtain and maintain liability insurance. The compulsory minimum insurance sum is €400,000 (for each insured event); for law firms in the form of an LLC or a lawyer-partnership whose sole general partner is an LLC, the compulsory minimum insurance sum is €2.4 million. The regional bar associations provide a further level of liability insurance for large-volume claims. Lawyers are permitted to limit the liability for damages to the minimum sum insured in a written agreement with their clients; limitations are, for example, provided in the template General Terms and Conditions issued by the bar association.

Lawyers are obliged to conduct mandates undertaken by them in accordance with the law and to represent the rights of their clients with loyalty and conscientiousness. They do not, however, owe the success of the proceedings, but only professional advice and representation of their clients.

The body of case law on damage claims against lawyers includes such mainstays as missed deadlines, (non-) delivery of monies or documents by lawyers acting as trustees, failure to take the interests of the counterparty into account where the counterparty has no legal representation, failure to adequately investigate facts, and the failure to warn about specific legal or factual risks. Many cases are settled by professional liability insurance without recourse to the courts.

Similar rules apply to public notaries. To the extent public notaries act as public authority (e.g., in probate proceedings), special rules apply.

ii Medical practitioners

Doctors, be they employed or in private practice, are compulsory members of the regional medical chambers and are subject to the Code of Medical Practitioners. They are required to have professional liability insurance (€2 million per occurrence, up to €10 million per year, depending on the legal form). Dentists have their own regional chambers.

A peculiarity of the Austrian medical system is that treatment costs are generally borne by the social security carriers. Accordingly, in malpractice cases patients will generally claim only compensation for pain and suffering as well as increased costs and loss of income. Social security carriers can, however, seek recourse from the medical practitioner for treatment costs in certain situations.

The main bases for medical liability are treatment errors (malpractice) and information errors: Malpractice is a violation of the treatment contract between the physician and the patient. A physician does not have to carry out every single treatment successfully⁶ but has to act *lege artis*. The standard of care of the practitioner is increased and objectified in line with Section 1299 of the Civil Code (see Section I.i). Classic examples for malpractice are damages because of wrongful drug prescription, major mistakes in surgery or damage caused by infections from lack of hygiene during treatment.

Since patients generally do not have full access to their entire medical file and have insufficient expertise to assess whether malpractice occurred, case law has shifted the burden of proof to the medical practitioners by allowing prima facie proof: in order to establish causality, the patient only has to prove that the doctor's mistake increased the probability of damage occurring; the doctor, on the other hand, has to prove that the error was, with high probability, not relevant for the occurrence of the damage.⁷

Medical practitioners can also be held liable if they fail to properly inform patients about the proposed treatment.⁸ A patient can only give consent effectively if he or she has been sufficiently informed about the significance of the planned medical intervention and its possible consequences.⁹ Since without effective consent any violation of the physical integrity of a patient in the course of the treatment is unlawful, failure to obtain sufficient consent can entail criminal liability.

There are a number of fora for patients to seek redress, before turning to courts to resolve their disputes. The injured parties can turn to *Patientenanwaltschaften* (patient advocates) in special complaints offices. In line with Section 11e of the Hospitals and Health Institutions Act, there are independent patient representatives in each province. Their main duty is to provide a preliminary clarification of complaints.

In addition, there are arbitration and conciliation boards within the medical chambers, which are intended to facilitate out-of-court settlements.

Both fora are of a non-mandatory nature free of charge for the patient. However, if the patient appoints a lawyer, the patient shall bear the costs.

Many malpractice cases can be resolved efficiently and economically in these fora; as a minimum, they generally provide further information to patients at low cost, giving them a broader base to assess the potential for obtaining damages in civil proceedings.

6 Austrian Supreme Court, decision of 4 July 1991, docket No. 6 Ob 558/91; see also Austrian Supreme Court, decision of 4 August 2009, docket No. 9 Ob 64/08i.

7 Austrian Supreme Court, decision of 29 January 2008, docket No. 1 Ob 138/07m.

8 Austrian Supreme Court, decision of 11 December 2007, docket No. 5 Ob 148/07m.

9 Austrian Supreme Court, decision of 30 January 1996, docket No. 4 Ob 505/96.

iii Banking and finance professionals

The banking and finance sector continues to be very heavily regulated, with relevant laws including the Securities Supervision Act 2007 (currently 2018), the Banking Act and the Capital Market Act, with the Financial Market Authority and, currently, the Austrian National Bank being the main supervisory bodies.

Banking and finance experts were, historically, not organised as a ‘profession’ in their own professional association. In the past, most banking and finance experts were employed or mandated by banks and financial institutions, their actions generally being attributable to these institutions.

Outside of banks and financial institutions or securities services providers, the provision of independent investment advice is a ‘regulated trade’ under the Austrian Trade Commerce and Industry Regulation Act, requiring, inter alia, formal qualifications and a licence, as well as compulsory insurance (approximately €1.4 million per occurrence, respectively €2 million per year).

The last decade has seen the development of a large body of case law regarding liability to customers and investors, with a strong focus on disclosure obligations. Austrian courts tend to protect those who want to invest but do not have access to necessary information before making a decision.¹⁰

In addition to general damages rules, Section 11 of Capital Market Act establishes a specific prospectus liability to compensate investors for disadvantages suffered in reliance on incorrect or incomplete information in a prospectus. The liability established by the Capital Market Act does not require an existing contract as it is based on the same principles as *culpa in contrahendo*, giving rise to pre-contractual obligations. In parallel, case law has developed ‘civil-law prospectus liability’ for incorrect or misleading information in marketing materials.

iv Computer and information technology professionals

In the field of computer and information technology professionals, the general rules laid out in Section I.i apply.

v Real property surveyors

Austrian law does not separately classify ‘real property surveyors’ as a profession. Technical surveyors are classed as civil engineers (see Section II.vi), whereas real estate evaluation is undertaken by a variety of experts, including property managers and real estate trustees.

vi Construction professionals

Technical construction professionals – including architects and chartered engineering consultants – are compulsory members of the regional chambers of architects and chartered engineering consultants. The conduct of the profession is governed by the Civil Engineers Law and Civil Engineers Chambers Law. Regional disciplinary boards monitor the practice of the profession.

Civil engineers are not required to have professional liability insurance. However, since in practice every contractor requires professional liability insurance, almost all civil engineers offer this insurance, with support from their regional chambers.¹¹

10 Austrian Supreme Court, decision of 26 November 1996, docket No. 10 Ob 2299/96b.

11 See more at <https://wien.arching.at/service/versicherungsservice/berufshaftpflichtversicherung.html>.

The primary areas of activity for architects that lead to disputes are negligence in planning, tendering and local project management (construction supervisor). Case law in this area predominantly involves planning activities, with courts clarifying that architects have to provide comprehensive advice, also taking economic aspects (financial possibilities of client, cost-effective planning) into account.¹² With regard to project management activities of architects, the Supreme Court has clarified that the supervisor does not always have to be present on site, and in general, random checks are considered sufficient.¹³

Disputes in this area are generally made more complex by the multitude of professionals and subcontractors involved, with numerous contractual and quasi-contractual relationships leading to complex issues regarding recourse and attribution of (contributory) negligence.

vii Accountants and auditors

The Austrian Auditors/Chartered Accountants and Tax Advisers' Act governs the practice of auditors and tax accountants, who are required to be members of the chamber of auditors or chartered accountants and tax advisers and to maintain a mandatory insurance (minimum €72,673 per occurrence). Similarly to lawyers, chartered accountants and tax advisers are subject to the chambers' disciplinary statutes.

The scope of auditors' liability is regulated in the Austrian Corporate Code (UGB). Auditors are obliged to conduct a conscientious and impartial audit and to adhere to strict rules on conflict of interest. Different maximum liability limits apply depending on the degree of fault and size of the company.

According to case law, the contract between the audited company and the auditor has a protective effect for the benefit of third parties, in particular investors and creditors,¹⁴ which establishes the auditor's liability to these third parties. The exact grounds for liability are disputed; in recent case law, the Supreme Court clarified that this liability to third parties is based on an objective statutory obligation, so that liability limitations agreed between the audited company and the auditor have no effect on such protected third parties. An auditor's failure to meet his or her obligations can also lead to criminal liability pursuant to Section 163b of the Criminal Code, which as a 'protective law' provides a broader basis for damages claims – including for pure economic loss – of persons relying on the auditors' certificate.

Claims arising from the auditor's liability towards audited companies, as well as, injured third parties¹⁵ become statute-barred after five years, irrespective of knowledge of the damage and the injuring party.¹⁶

In contrast to auditors' liability, tax accountants are regularly not liable to outside third parties for the accuracy of their annual accounts.¹⁷

viii Insurance professionals

Insurance professionals can be divided into two groups: insurance brokers and insurance agents.

12 Austrian Supreme Court, decision of 26 January 2010, docket No. 9 Ob 98/09s.

13 Austrian Supreme Court, decision of 14 October 1997, docket No. 1 Ob 2409/96p.

14 Austrian Supreme Court, decision of 27 November 2001, docket No. 5 Ob 262/01 t.

15 Austrian Supreme Court, decision of 23 January 2013, docket No. 3 Ob 230/12 p.

16 Section 275(5) of UGB.

17 Austrian Supreme Court, decision of 29 November 2005, docket No. 10 Ob 57/03 k.

Insurance brokers are governed by the Austrian Trade Commerce and Industry Regulation Act, pursuant to which insurance brokers must be entered into the Insurance and Credit Mediation Register and require compulsory insurance (€1.25 million per occurrence, respectively €1.85 million per year). Pursuant to Section 26(1) of the Brokers Act, a broker mediates insurance contracts on a commercial basis, namely arranges transactions with a third party on the basis of an agreement under private law (brokerage contract) for a client without being permanently entrusted with this duty.

Brokers are obliged to arrange the best possible insurance cover according to the circumstances of the individual case (i.e., ‘best advice’) and must carry out successful risk management for their clients with the most favourable cover possible in each individual case. It is also their contractual obligation to explain to the insurer the specific insurance cover they are seeking for their customers, with specific duties of results in duties of protection, care and advice for the latter. As experts within the meaning of Section 1299 of the Civil Code, they are also liable for identifying relevant problems and providing correct information.

Insurance agents, in contrast, who are constantly entrusted by an insurer to close insurance contracts for the insurer, are subject to the Insurance Contract Act. Liability claims arising from negligent acts of these agents are generally (also) directed against the insurer, who will generally be held liable for the actions of an insurance agent under Section 1313a of the Civil Code.

III YEAR IN REVIEW

i General developments

Case law in the area of professional negligence continues to focus on investor-related disputes, as a result of the heavy caseloads of the commercial courts for investor claims in recent years (see Section III.ii).

The General Data Protection Regulation (GDPR) came into force on 25 May 2018. Professionals dealing with sensitive data – most particularly doctors – are now subject to stricter requirements when it comes to controlling, storing and processing this data. As already discussed, Section 1299 of the Civil Code requires from a professional an objective standard of diligence. The GDPR adds another layer of obligations, thus widening the scope of the objective standard of diligence.

ii Profession-specific developments

Legal practitioners – case law developments

In the context of investor claims, a notary public’s liability as an ‘expert’ was tested. A Swiss investment vehicle offering investments in precious metals had instructed an Austrian notary public to regularly issue confirmations whether the actual stock of precious metals conforms to the target stock. While the notary public was not instructed to physically inspect the stock, he was aware that his confirmations would give (potential) investors the impression that he had done so. The Austrian Supreme Court held that the notary’s confirmations qualified as a civil law ‘prospectus’, since they were intended to promote the investment opportunity and, by appearing to be an objective basis of information on the investment, were designed to influence the potential investor’s investment decisions. Since the notary was fully aware of this, he was held liable for the investor’s losses both as an expert (Section 1299 of the Civil Code) and under civil law prospectus liability.

Medical practitioners – case law developments

One of the most debated issues in the area of medical negligence is the concept of wrongful birth (i.e., where the birth of a (severely) disabled child was not prevented due to medical misconduct during the pregnancy). If prenatal diagnostics indicate a severe disability of an unborn child, the doctor's failure to inform the mother of the disability and the possibility of abortion is a breach of the doctor's contractual obligations. Although the child itself does not constitute a damage, the maintenance and care costs do, for which the doctor or hospital, or both, can be held liable. In its latest decision, the Austrian Supreme Court clarified what exactly the parents can claim from doctors and to what extent increased social security benefits reduce their claims against the doctors.¹⁸ Care allowance received by the handicapped child from social security carriers reduces the parents' claim for compensation for the cost of care, since to the extent the child's care is covered by this allowance, the parents are not obliged to pay for increased costs and thus suffer no damage. The increased family allowance paid to parents of handicapped children is not, however, intended to benefit the damaging parties and thus does not reduce their compensation obligations.

Banking and finance professionals – statutory amendments and case law

The most recent legislative amendment affecting professional negligence in the area of banking and finance is the amendment of the Austrian Securities Supervision Act (WAG 2018) in implementation of MiFID II (2014/65/EU), which came into force in January 2018. The amendment aims to increase investor protection by increasing transparency and disclosure obligations for financial services providers and by reducing conflicts of interest. Section 47 et seq. contain detailed obligations to act in the best interests of the customer and to provide full disclosure. When providing independent investment advice, they are not permitted to accept any form of benefit from third parties. Investment advisers must, moreover, document that they have assessed the suitability of the security for the customer on the basis of comprehensive information obtained from the customers on their financial status, their investment objectives and their prior experience and understanding of the risks. These rules are flanked, inter alia, by comprehensive product governance rules, reporting requirements and cost transparency.

In line with these increasing disclosure requirements, an interesting case in 2018 turned on the question of whether a bank is required to inform its customers that the market value of an interest swap is negative at the time the customer enters into the transaction. The Austrian Supreme Court referred to German case law¹⁹ and the information and diligence obligations under the Securities Supervision Act, in particular the bank's comprehensive obligation to act in the customer's best interest, to use its expertise for the customer's benefit and to desist from pursuing its own interests if these are contrary to the customer's interest (save for its remuneration). It held that the bank should have informed the customer that the initial market value of the swap was negative (i.e., that the market assessed the client's risks as higher than the bank's risk). The determinative issue is whether the customer fully understood the specific type and risks connected with the financial instrument and the bank's conflicting interests.

18 Austrian Supreme Court, decision of 23 January 2019, docket No. 1 Ob 203/18m.

19 e.g., German Federal Supreme Court (BGH) XI ZR 65/16, 20 February 2018.

In a case initiated by an Austrian consumer protection organisation – the Chamber for Workers and Employees, the Supreme Court drew the limits of disclosure obligations. The defendant, an investment adviser, had explained that the securities the customer was interested in were corporate bonds, that ‘something could happen’ and that ‘higher interest rates are associated with a little more risk.’ The customer had stated it wanted an investment with medium risk (class 3). Insolvency proceedings were subsequently initiated against the issuer. The Supreme Court held that, absent any indications of impending insolvency, the adviser was not obliged to warn investors of the general insolvency risk associated with every investment.²⁰

IV OUTLOOK AND FUTURE DEVELOPMENTS

In order to balance the ever-growing use of technology, legislators and state authorities are expected to introduce reforms and amendments that will affect professionals.

For instance, the introduction of regulations for cryptocurrencies is currently under discussion, in view of increasing criminal activity in this area (e.g., Optioment). The Austrian Financial Market Authority (FMA) has voiced various proposals, including a prospectus requirement for initial coin offerings, with a suggested threshold of €2 million. In addition, the FMA proposes a licensing obligation for dealers, a ‘mini-bank licence’.

In the medical field, there is an ever-stronger focus on the use of artificial intelligence (AI). Courts may well have to begin tackling questions in this context, for example, with regard to direct or indirect attribution of harm caused by AI.

20 Austrian Supreme Court, decision of 24 October 2018, docket number 3 Ob 187/18y.

BRAZIL

Marcia Cicarelli, Camila Affonso Prado and Laura Pelegrini¹

I 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 such 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 freelancer³ will be subjective 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 subjective 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 this result at the end.

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.

1 Marcia Cicarelli is a senior partner and Camila Affonso Prado and Laura Pelegrini are senior associates at Demarest Advogados.

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

3 Vanessa 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 profissional e a reparação de danos', master's dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, p. 157.

Nonetheless, such 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.

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

As an example, the work of a contractor is an obligation of result because only the completion of the work within 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. Vaneska Donato de Araujo explains that ‘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, and given that an obligation of result does not require evidence of fault, an important distinction must be made as to whether the professional liability will be strict liability. The answer is negative. This is because fault is never discussed in strict liability, nor as a matter of defence. It is up to the creditor to simply demonstrate the unlawful act, the damage and the causal link.

In situations where civil liability involves obligations of result, the creditor does not have to prove the fault either. 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 technique and diligence to obtain the result. This means that civil liability with respect to obligation of result will be subjective, 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 the obligation to indemnify. However, these clauses will not be valid 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

4 Araujo, Vaneska Donato de, ‘A responsabilidade civil profissional e a reparação de danos’, master’s dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, pp. 154–155.

5 Araujo, Vaneska Donato de, ‘A responsabilidade civil profissional e a reparação de danos’, masters’ dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, p. 156.

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 Brazilian Civil Code. In this context, the defences available to the employer are limited, such as acts of God or force majeure, the victim’s exclusive fault, 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 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 Brazilian Civil Code.¹⁰

The 10-year term also applies to the constructor’s liability for defects in the construction work. According to Article 618 of the Brazilian 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

6 Araujo, Vaneska Donato de, ‘A responsabilidade civil profissional e a reparação de danos’, master’s dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, p. 164.

7 Araujo, Vaneska Donato de, ‘A responsabilidade civil profissional e a reparação de danos’, master’s dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, p. 167.

8 Superior Court of Justice, REsp. 1,067,194, Judge Sidnei Beneti, ruling: 16 December 2008.

9 Superior Court of Justice, REsp 1,798,127, Judge Ricardo Villas Bôas Cueva, ruling: 2 April 2019.

10 Superior Court of Justice, AgInt REsp 1,731,038, Judge Moura Ribeiro, ruling: 21 August 2018.

11 Superior Court of Justice, REsp 1,290,383, Judge Paulo de Tarso Sanseverino, ruling: 11 February 2014.

iii Dispute fora and resolution

The state courts are competent to judge the 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 Brazilian 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.

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, and which will be set by the judge and may vary between 10 per cent 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 high, therefore, this option is only commonly adopted in strategic cases.

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 39,920 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 Brazilian 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 the 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. According to Sérgio Savi, the loss of chance is only established when it represents a probability higher than 50 per cent. Nonetheless, 'the indemnification of the lost chance will always be less than the value of the expected useful result'.¹²

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

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’.¹³

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 subjective 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.¹⁴ In this regard, Article 32 states that ‘the lawyer is responsible for actions committed with fraud or negligence in the exercise of the profession’.

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’.

In summary, the doctrine holds that the lawyer is liable for errors of fact as well as for errors of law,¹⁵ but, in the latter case, only when they are serious.¹⁶

Therefore, while it would be necessary to verify 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.¹⁷

ii Medical practitioners

The medical profession is governed by Resolution No. 2,217/2018 of the Federal Council of Medicine, which approved the Medical Code of Ethics.

This is a new Resolution effective as of 30 April 2019. However, the provisions regarding the medical liability are the same as the ones established by the revoked Resolution 1,931/2009. Article 1 of the Resolution establishes that the doctor is prohibited from ‘causing harm to the patient, by action or omission considered as malpractice, recklessness or

13 Superior Court of Justice, REsp 1,677,083, Judge Ricardo Villas Bôas Cueva, ruling: 14 November 2017.

14 Dias, José de Aguiar. *Da responsabilidade civil*. 12. ed. Editora Lumen Juris: Rio de Janeiro, 2011, pp. 353–354.

15 Gonçalves, Carlos Roberto. *Responsabilidade civil*. 9. ed. São Paulo: Saraiva, 2006, p. 393.

16 Dias, José de Aguiar. *Da responsabilidade civil*. 12. ed. Editora Lumen Juris: Rio de Janeiro, 2011, p. 359.

17 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.

negligence'. Article 1 adds that 'medical liability is always personal and cannot be presumed'. In other words, it confirms the medical professional's subjective responsibility derived from the obligation of means.

Also, 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. Even if the consent is obtained, the doctor shall assume responsibility for the professional act, in accordance with Article 4.

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'.¹⁸ The position of the Superior Court of Justice is that cosmetic surgery is an obligation of result, while restorative surgery is an obligation of means.¹⁹

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 of 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 exams.²⁰

The responsibility for anaesthesia has also been discussed. For Sílvia Venosa, it is an obligation of means.²¹ 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'.²²

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 has an obligation of means.²³ However, in the case of cosmetic treatment or preventive dentistry, the obligation is one of result.²⁴

Finally, regarding the quantification of damages, the Brazilian Civil Code expressly establishes in Article 951 (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.

18 Venosa, Sílvia de Salvo. *Direito Civil: Responsabilidade Civil*. 14.ed. São Paulo: Atlas, 2014, p. 148.

19 Superior Court of Justice, REsp 1,097,955, Judge Nancy Andrichi, ruling: 27 September 2011.

Superior Court of Justice, AgInt AREsp 1,095,904, Judge Maria Isabel Gallotti, ruling: 22 March 2018.

20 Superior Court of Justice, REsp 1,707,817, Judge Nancy Andrichi, ruling: 7 December 2017.

21 Venosa, Sílvia de Salvo. *Direito Civil: Responsabilidade Civil*. 14.ed. São Paulo: Atlas, 2014, p. 168.

22 Superior Court of Justice, REsp 605,435, Judge Nancy Andrichi, p. 2 of Judge Raul Araújo vote, ruling: 14 September 2011.

23 Superior Court of Justice, REsp 1,184,932, Judge Castro Meira, ruling: 13 December 2011.

24 Araujo, Vaneska Donato de, 'A responsabilidade civil profissional e a reparação de danos', master's dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, pp. 217–218.

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.

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.

The 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 has recently reaffirmed this understanding when judging the case in REsp 1,602,196, on 20 February 2019.

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 No. 5101/2016 and No. 3065/2015 is to regulate the profession of systems analyst 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, whose responsibility is addressed in Section II.vi, generally carry out this kind of work.

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 with the completion of the work, but also with the 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.²⁵

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.²⁶

In this context, Article 622 of the Brazilian 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 Brazilian Civil Code establishes that liability shall be objective in building contracts or other significant constructions where the material and execution provider shall be liable for the irreducible period of five years for the soundness and safety of the work, and for the materials and the soil. In this case, the provider will respond for a period of five years, with the owner of the project having 180 days to file a lawsuit, according to Article 618.

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 such 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 subjective liability regime.

In this regard, the Superior Court of Justice has decided that in cases of audit service the subjective regime applies as long as there is evidence of fault, damage and causal link with the opinion or audit report issued.²⁷

25 Araujo, Vaneska Donato de, 'A responsabilidade civil profissional e a reparação de danos', master's dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, pp. 217–262.

26 Araujo, Vaneska Donato de, 'A responsabilidade civil profissional e a reparação de danos', master's dissertation, Faculdade de Direito da Universidade de São Paulo, 2011, pp. 217–272.

27 Superior Court of Justice, REsp 1,281,360, Judge Luis Felipe Salomão, ruling: 21 June 2016.

viii Insurance professionals

The insurance professionals regulated in Brazil are insurance brokers and actuaries.

Insurance brokers are regulated by Law No. 4594/1964, 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 and 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 legal entities, of public or private law'. The exercise of the profession depends on obtaining the qualification certificate, issued by 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'.

On the other hand, 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.

III 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.

In this context, recent legislative changes in the professional liability have been observed in the specific laws applied to doctors, nurses, accountants and nutritionist professionals.

A new Code of Ethics and Discipline for Doctors came into force on 30 April 2019 (Resolution 2,217/2018). The provisions regarding medical liability are the same as the ones established by the revoked Resolution 1,931/2009. In summary, the subjective responsibility derived from the obligation of means is applied. Among the main innovations, we would highlight: (1) the rights of physicians who have health disabilities or chronic diseases to exercise their professional activities within the limits of their capacity and without endangering the life and health of patients; (2) the use of social networking to advertise medical services, which will be regulated by specific resolutions; and (3) the possibility of forwarding a copy of the medical patient records directly to the judge when required judicially.

A new Code of Ethics for Accountants (NBC PG 01) has also been approved in February 2019. The Code will enter into force on 1 June 2019 and sets forth rights and duties applying to accountants. Regarding professional liability, the Code establishes that the accountant is prohibited from causing damages by fault or wilful misconduct during the performance of their functions, pursuant to item 5(i) of the Code.

In addition, a new Code of Ethics for Nutritionists (Resolution 599/2018) came into force on 4 June 2018. Regarding professional liability, Article 23 provides that the nutritionist is prevented from committing harmful acts to individuals under their responsibility that may be regarded as malpractice, recklessness or negligence. Therefore, the subjective regime applies.

Furthermore, a new Code of Ethics for Nurses came into force on 5 April 2018 (Resolution 564/2017). It is provided that the subjective liability applies to the professional, regardless of whether the damage was caused by the nurse individually or by the team. In cases where damage was caused by a team of nurses, the liability shall be attributed to each professional to the extent of the act practiced individually, as per the single paragraph of Article 51.

Finally, there is an ongoing Bill No. 2664/2011 that is intended to regulate the profession of environmental manager. This Bill provides rights and duties applying to the professional and establishes the activities that may be practiced by them, such as environmental education, draft of environmental policies, development and execution of environmental projects, evaluation of environmental impacts and environmental advice. There is no specific provision regarding the applicable liability regime, reason why the general regime based on the assessment of fault should be applied to environmental managers.

ii Relevant case law

We highlight below relevant case law recently issued by the Superior Court of Justice.

On 10 December 2016, the Superior Court of Justice²⁸ dismissed the civil responsibility of a hospital for a medical error caused by a physician who was not subordinated to the hospital. The Court found that the hospital's facilities were used only for medical care, the professional had been individually chosen by the patient and the members of the hospital had no participation in the treatment provided.

As the doctor had no employment relationship, the hospital was not found liable because of the rupture of the causal link between the activity undertaken and the result, according to fault-based liability.

Moreover, the Superior Court of Justice has repeatedly accepted the application of the theory of the loss of chance in the civil liability of the physician. Considering that the obligation of this professional is one of means, the liability is acknowledged in cases where the malpractice reduced the serious and real chances of recovery of the patient. On the other hand, if the chances of cure were low, the Superior Court of Justice has decided that the medical error is not characterised.²⁹

The Superior Court of Justice has held that the responsibility based on the theory of the loss of chance applies because: (1) there is a concrete and real chance of obtaining a benefit or decreasing the chances of suffering injury; (2) an action or omission of the defendant has resulted in the loss of opportunity to exercise the chance; and (3) the harm is not the lost benefit, because this is always hypothetical.

28 Superior Court of Justice, REsp 1,635,560, Judge Nancy Andrighi, ruling: 10 November 2016.

29 Superior Court of Justice, REsp 1,662,338, Judge Nancy Andrighi, ruling: 12 December 2017.

IV OUTLOOK AND FUTURE DEVELOPMENTS

Professional liability insurance is an important instrument for the management of professional risks and its use is fully established and continues to develop and grow in Brazil.

According to data provided by SUSEP, liability insurance showed a 35.6 per cent increase from January to August in 2017 in comparison with the same period in 2015, with premium collection increasing from 154.5 million reais to 209.5 million reais. In 2018, the premium collection amounted to 365 million reais with respect to professional liability insurance.³⁰

The increase in demand for professional liability insurance can be explained by the evolution of the civil liability system and the increasing number of cases where professionals are found liable.

Professional liability insurance, also known as errors-and-omissions (E&O) insurance, guarantees the insured the reimbursement of compensation that he or she is due because of the occurrence of a failure or professional error, in addition to the defence costs incurred in judicial or administrative claims filed by third parties.

The insured is the professional individual or legal entity. Insurers make available specific products according to the professional practice.

E&O insurance is commonly retained by health professionals (doctors, nurses and dentists, as well as hospitals and clinics), engineers, architects and designers, lawyers and law firms, accountants, real estate brokers, insurance agencies, advertising and publicity agencies, travel agencies, technology and information professionals, notaries, real estate managers and educational institutions.

The purpose of the insurance is to provide financial protection to the insured from failures committed in the exercise of the profession. E&O insurance guarantees the liability of the professional towards clients in respect of professional errors that cause damage, unlike general liability insurance, which guarantees the liability of the insured against third parties, whether or not they have a contractual relationship with the insured; and unlike the liability insurance of company directors and officers (D&O), which guarantees the personal liability of managers in respect of management acts.

E&O insurance is usually provided by way of a claims-made policy, which requires that: (1) the wrongful act (the professional failure) is committed during the policy period or the retroactivity period; and (2) the claim presented by the third party is filed during the policy period or within an additional term.

The retroactivity period shall be determined by the insurer when underwriting the policy, according to the risk, the previous policies and claims. The date will act as a deadline within which the professional failure, necessarily unknown to the insured at the time of contracting, must have occurred. In other words, any errors committed prior to the retroactivity period are excluded from coverage.

30 Data available at SUSEP's website: <http://www2.susep.gov.br/menuestatistica/SES/premiosesinistros.aspx?id=54>.

The additional period corresponds to an extra term for submission of third-party claims; this will be a term of at least one year, but the parties are free to negotiate this.

The main exclusions from coverage are: intentional illicit acts, as long as they are acknowledged as such by a final judicial or arbitral decision; payment of taxes; fines or penalties directly suffered by the insured; claims arising from labour liability; environmental damage; unfair competition; corruption, fraud and dishonesty; discrimination and assault; and bankruptcy and insolvency.

It is important to note that the coverage will be directly linked to the extension of the liability of the insured, in accordance with the applicable liability regime and the limits established by the contract with the client.

By means of such 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. In this sense, E&O is an important instrument to mitigate risk and grant economic protection to the professional activity.

COLOMBIA

Laura Restrepo Madrid and Ana Isabel Villa Henríquez¹

I INTRODUCTION

Professional negligence in Colombia is a developing legal category that is currently not regulated by specific legislation. Development in this area has been led by national legal doctrine, which closely follows French and Argentinian teachings. At court level (especially in the area of medical liability), there is also a series of rulings, but jurisprudence is far from being systematic.

It is difficult, therefore, to write about professional negligence where its development is merely incipient. However, in this chapter we will define the legal framework, as well as the remedies and procedure that must be followed to pursue compensation for damage, and review this framework with regard to specific professions. We will then conclude with an overview of what has happened in recent years and what is expected in the future.

i Legal framework

Colombian legal doctrine understands professional negligence as the responsibility that derives from the infraction of duties by certain subjects who, on account of having special theoretical and practical knowledge, must act with special diligence, abiding by the *lex artis*, under which they are bound by duties and obligations stricter than those demanded by the 'prudent-person' principle.

The main elements of this type of responsibility are clearly derived from this definition, but it is necessary to make special reference to certain points, such as who may be liable for professional negligence, the obligations and special duties of the professional, and the liability regime itself; these points are considered below.

What is understood by 'professional'

In brief, it can be said that a professional is someone who regularly performs a licit activity in exchange for remuneration, whether or not that person has an academic degree that qualifies him or her to do so.² National legal doctrine seems to agree that to be considered a professional it is not necessary to have an academic degree, and experience obtained by

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2 Tascón, Juan Bernardo. *Responsabilidad Civil, Derecho de Seguros y Filosofía del Derecho: Estudios en Homenaje a Javier Tamayo Jaramillo*, Biblioteca Jurídica Diké, 2011: 1147.

repeatedly practising the activity is sufficient.³ This is very important in a country such as Colombia, where access to higher education is restricted and the figures for those engaged in the informal economy have reached 48 per cent.⁴

Another common characteristic is having an organisation, whether rudimentary or elaborate, to exercise their trade effectively and prevent or face the risks inherent in the activity.

Finally, and perhaps the most relevant feature, is the specialist knowledge particular to the profession and the competence of the professional compared with a normal citizen in relation to the techniques and rules of their trade (known as the *lex artis*).

In summary, it is said that the criteria for identifying a professional are the presence of the characteristics of specialism and habitual practice, and the onerous nature of the activity.⁵

Special duties

Professionals have a series of special duties derived from but somewhat more stringent than the general duty of prudence and the principle of good faith.

Diverse classifications of the duties of the professional have been elaborated in legal doctrine, but we share the one given by Juan Bernardo Tascón:

- a* loyalty to the client and to third parties (i.e., acting transparently and respecting their rights, and avoiding inducing them into any deception);
- b* duty to act faithfully, that is, to execute the contract fully, on time and in the best possible manner, in accordance with the *lex artis*;
- c* information and advice;
- d* cooperation;
- e* confidentiality; and
- f* security duties, related to caring for the physical or patrimonial integrity of people and things with which the professional has contact in the exercise of his or her contractual obligations.⁶

Liability regime

Failure to comply with any of the above-mentioned duties may lead to professional liability for damage caused to third parties.

There is no separate professional negligence regime, despite the different movements that advocate for the structuring of an autonomous regime.⁷ In any case, the principles of civil liability are applicable to professional negligence and, therefore, the causal connection between damage and conduct must be verified.

This responsibility will be of a contractual or extra-contractual nature, depending on the existence or non-existence of a contract between the professional and the victim.

3 Palacio Barrientos, Juan David. 'La Responsabilidad de los Profesionales', in: *Revista IARCE* No. 23 – June/2008: 114.

4 See www.portafolio.co/economia/gobierno/informalidad-laboral-en-colombia-2016-503278 (last accessed 12 March 2018).

5 Suescún Melo, Jorge. *Derecho privado: Estudios de Derecho Civil y Comercial Contemporáneo*, Vols. 1 and 2, 2nd ed. Legis, 2005.

6 Tascón, JB, 2011: 1147–1148 (see footnote 2).

7 Suescún Melo, J, 2005 (see footnote 5); Tascón, JB, 2011 (see footnote 2).

In regard to the liability imputation factor, there is no general rule, but it is an eminently subjective responsibility, where it is necessary to prove the professional's negligence (conduct that does not meet the due diligence requirement or is contrary to professional duties). In this regard, prominent teachers⁸ propose as a general foundation of professional negligence the rule contained in Article 2144 of the Colombian Civil Code (unless a specific rule applies), according to which the services of professions and careers that require long studies are subject to the rules of agency in which liability is of a subjective nature and in light of which the agent is liable even for slight negligence. The strictness of this responsibility will depend on the gratuity or paid nature of the contract and whether the agent has been forced to accept the assignment despite initially having rejected it.⁹

However, there are events in which professional negligence may be a case of strict liability; for example, regarding warranty obligations, liability for defective products, obligations to achieve results, carrying out dangerous activities¹⁰ or, according to some authors,¹¹ overseeing the physical or patrimonial integrity of people or things – although traditional legal doctrine¹² establishes that security duties may be of best efforts or to achieve results, depending on the situation.

ii Limitation and prescription

The Colombian legal system foresees terms of prescription and expiration of the action. In the first case, the general prescription terms apply, depending on the liability regime applicable in the specific case (i.e., contractual or non-contractual). When the administrative jurisdiction is concerned in the action of professional negligence, there may be special rules relating to the time in which the action must be exercised (expiration).

Additionally, Colombian law establishes specific periods of limitation, as in certain kinds of contracts through which the professional activity is exercised, or in the case of consumer relations. For example, the law provides that in transport contracts the term within which to exercise the action is two years.¹³ In insurance contracts, there are two types of limitation period: ordinary prescription, which applies to the insured and runs from the moment he or she had or should have had knowledge of the event; and extraordinary prescription, which runs against anyone, and is five years from the occurrence of the event.¹⁴

In the second case, Law 1480/2011 (the Consumer Protection Statute) sets forth special warranty terms, within which producer and supplier must respond for the quality, suitability, safety and good condition and functioning of the product,¹⁵ while the consumer must bring the claim within the established warranty period. Additionally, this Statute provides special deadlines for the exercise of consumer protection actions, applicable in all sectors of the economy regardless of whether the actions are brought to discuss contractual disputes.¹⁶

8 Tamayo Jaramillo, Javier. *Tratado de Responsabilidad Civil*, Vol. I, 2nd ed. Temis, 2007: 526–529.

9 Civil Code, Article 2155.

10 In the case of liability for hazardous activities, since there is a presumption of guilt and it is disputed, whether the liability is strict or remains subjective.

11 Le Tourneau, Philippe. *La Responsabilidad Civil Profesional*, traducción de Javier Tamayo Jaramillo, Legis Editores, 2006: 188.

12 Tamayo, J, 2007: 89 (see footnote 8).

13 Code of Commerce, Article 993.

14 Code of Commerce, Article 1081.

15 Law 1480/2011, Articles 7 and 8.

16 Law 1480/2011, Article 58 No. 3.

At present, considering the limitation periods imposed by the Consumer Protection Statute, the problem arises as to whether these have become the general rule, since most market relationships are consumer relations and for that reason the Consumer Protection Statute would be applicable. At present, there is no definitive answer to this question and the statute of limitations must be considered case by case in the jurisdiction where the claim is heard.

iii Dispute fora and resolution

Ordinary jurisdiction

Most professional negligence cases are brought in the ordinary jurisdiction. The quantum of the claims will determine whether it will be a single-instance or double-instance process. If the claims exceed 1,000 Colombian legal monthly minimum wages,¹⁷ the Supreme Court of Justice, the highest court of the ordinary jurisdiction, may hear the matter as a court of cassation.

Administrative jurisdiction

Some professional negligence conflicts are brought before administrative courts. Disputes are heard in this jurisdiction against public entities or individuals exercising a public function. The most important advances and rulings have occurred in the medical liability area.

As in the ordinary jurisdiction, in the administrative jurisdiction the processes may be of single or double instance, depending on the quantum of the claim. In cases involving more than 500 Colombian legal monthly minimum wages, the Council of State, the highest court of the administrative jurisdiction, may function as a second-instance court.

Procedure

Whether the claim is brought before ordinary or administrative courts, the stages of both procedures are quite similar. First, the parties will be integrated into the process by submitting the claim and its response. Subsequently, a pretrial hearing is held, where the matters to be discussed in the process are defined. Finally, the trial is held and the ruling made.

However, both procedures are governed by different codes: the ordinary jurisdiction is governed by the General Procedural Code and the administrative jurisdiction by the Code of Administrative Procedure and Administrative Litigation. Although both codes consider oral proceedings and procedural economy, there are differences between them (particularly in matters of evidence and remedies) that preclude the idea of a unified regime to facilitate the role of parties in judicial processes.

iv Remedies and loss

In Colombia, there are no specific remedies for each right. To claim damages for professional negligence, the general rule is to commence a declaratory procedure before the civil courts or a direct reparation action before administrative courts, depending on which is competent in the case. It will be very important to adequately formulate the claims in the lawsuit, distinguishing whether it is a contractual or non-contractual liability regime.

¹⁷ The legal monthly minimum wage for 2019 in Colombia is 828,116 pesos.

Regarding damages, Colombian case law recognises compensation for pecuniary and non-pecuniary damage.

Pecuniary damage

Our legal system divides pecuniary damage into costs incurred and lost profits.

‘Costs incurred’ means ‘an asset has left or will leave the victim’s estate’.¹⁸

There is loss of profit ‘when an asset that should have, in the normal course of events, entered the victim’s estate did not nor will not enter the victim’s estate’.¹⁹ Documentary evidence and experts’ reports can be used to demonstrate these losses and their quantum.

Non-pecuniary damage

In addition to patrimonial assets, the Constitution and laws protect other non-pecuniary rights that may suffer impairment in professional negligence cases. Colombian judges recognise three principal types of non-pecuniary damage.

First, moral damage,²⁰ which refers to the victim’s condition due to physical or emotional suffering.

Second, the damage that affects the victim in his or her relationship with another, or his or her conditions of existence.²¹ This type of damage refers to cases in which the victim suffers an impairment of his or her way of living, making it impossible or difficult to continue to perform activities that gave him or her pleasure and enabled his or her existence.

Third, Colombian jurisprudence recognises compensation for damage caused to other constitutionally protected rights, such as the right to a good name or honour.

All non-pecuniary damage must be proved in the process, although there are some specific cases in which its existence is judicially presumed.²² Unlike that of other jurisdictions, Colombian case law has defined standards to assess this damage. The High Courts, through their rulings, have indicated the maximum sums that may be granted in certain groups of cases, and these serve as guiding criteria for judges exercising discretionary power.

II SPECIFIC PROFESSIONS

i Lawyers

The responsibility of lawyers is a subject little debated in Colombian jurisprudence and legal doctrine, which are in default of having a serious discussion of the matter. Today, the act of an advocate can engender state responsibility when they act in the exercise of a state function, as in cases of judicial error; or civil liability, if the damage caused by the professional’s conduct arises when the latter acts as a private attorney. Considering the interest of this chapter, we will focus on the second case, where litigation may be based on contractual or non-contractual liability, depending on whether there was a professional services contract.²³

18 Tamayo, J, 2007, Vol. II: 475 (see footnote 8).

19 Tamayo, J, 2007, Vol. II: 475 (see footnote 8).

20 i.e., pain and suffering.

21 i.e., loss of amenity.

22 The presumption also operates for moral damage suffered by the closest relatives of the deceased direct victim.

23 Álvarez P, Andrés Orión. ‘La Responsabilidad Civil del Abogado y su Aseguramiento’. Part I, in: *Revista IARCE* No. 25 – July/2009: 297–320.

As a general rule, the responsibility of the lawyer is subjective, since the main obligation in the agency contract is to act with diligence, care, expertise and professionalism.²⁴ This does not exclude the existence of accessory obligations to achieve results in the contract. For example, the lawyer must use all his or her expertise to defend the client, without this implying that he or she must win the process, but he or she must submit a timely response to the lawsuit. The first is a best-efforts obligation, the second, an obligation to achieve results.

Furthermore, lawyers are subject to specific rules for the exercise of the profession compiled in the Disciplinary Code of the Legal Profession,²⁵ which defines the guiding principles for the exercise of the profession, the disciplinary offences and their corresponding sanctions, as well as the entire disciplinary procedure. The Code also contemplates the period of limitation of these disciplinary actions (i.e., five years from the occurrence of the fault, in general).²⁶ Disciplinary actions against lawyers are heard by the Superior Council of the Judiciary and its sectional councils.

Finally, Colombian case law has used different institutions to distinguish which losses may be attributed to lawyers in the context of civil liability, and to determine how they are assessed. As to the first point, ‘loss of opportunity’ (brought from French law) has been coined for those cases in which the lawyer has deprived the victim of the possibility of earning a benefit. Under this institution, the compensable loss is not the loss of the case itself, but the loss of the possibility of winning it.²⁷ Damages are calculated according to the theory of prosecution judgment,²⁸ which is based on the same principle as the theory of loss of opportunity, in that damages are determined based on previous decisions in similar cases and other objectively applicable rules.

ii Medical practitioners

Health professionals can be prosecuted in two ways: first, with regard to medical ethics standards;²⁹ and second with regard to civil liability. In the first case, the act of the professional is examined to determine whether it complies with the general ethical and technical standards of the medical profession such that, in the event of deviations, sanctions are imposed on the practitioner. These cases are heard by the National Medical Ethics Tribunal and regional medical ethics committees³⁰ composed of doctors.

In the second case, the assessment also concerns the doctor’s behaviour and whether it complies with the standard required of a professional with similar characteristics in a similar situation, but particularly with a view to establishing whether there is civil liability for damage caused to the victims. As a general rule, the claimant must prove the practitioner’s negligence, because medical practitioners are, as a matter of course, required to practise using ‘best efforts’.

24 Tamayo, J, 2007: 526–529 (see footnote 8); Álvarez, AO, 2009: 308 (see footnote 23).

25 Law 1123 of 2007 (amending Decree 196 of 1971 (the Statute on the Practice of Law)).

26 Law 1123/2007, Articles 23 and 24.

27 Chabas, François. ‘La pérdida de una oportunidad (“chance”) en el derecho francés de la responsabilidad civil’, in: *Revista Responsabilidad Civil y del Estado*. September 2013, No. 33., Vol. II, 8-14 Ed.: 55–76.

28 Also known as: ‘the judgment of the judgment’. Álvarez P, Andrés Orión. ‘La Responsabilidad Civil del Abogado y su Aseguramiento’. Part II in: *Revista IARCE* No. 26 – November/2009: 233–252.

29 Law 23 of 1981 (the Code of Medical Ethics) and Decree 3380 of 1981, which regulates the former.

30 See <https://tribunalnacionaldeeticamedica.com/nosotros> (last accessed 15 March 2018).

Notwithstanding the above, as regards state liability for failure to provide medical services, there is a robust Council of State (CE) precedent where negligence on the part of the practitioner is presumed,³¹ especially in gynaecological services: according to the CE precedent, the patient's healing is to be regarded as the normally expected outcome and, in the event of an abnormal result or damage, the practitioner must prove that the outcome was not caused by negligence on his or her part.³²

Consequently, courts have embraced the theory of a dynamic burden of proof – imposing the burden of proof on the defendant doctor – arguing that the technical knowledge and direct service provided put the health professional in a better position to prove the absence of negligence. What was initially a case-law precedent has turned into law and our most recent procedural laws order the application of this theory.³³

However, there is agreement in national legal doctrine and jurisprudence that the responsibility of the practitioner is subjective and, therefore, based on fault, although in some instances, strict liability applies. This is the case for aesthetic procedures,³⁴ or improper handling of a hazardous object used in the medical act.³⁵

The absence of informed consent is a recurrent cause of liability in the Colombian jurisdiction. If informed consent is not duly taken, the practitioner will be held liable. Finally, it should also be mentioned that the Colombian High Courts have issued medical liability rulings under the theory of loss of opportunity.

iii Banking and finance professionals

This group of professionals includes financial institutions, banks, finance companies and other companies that carry out activities in the financial market.

The applicable liability regime is the one explained in previous sections for professionals in general, which may be contractual or non-contractual, but with the distinction that these entities are subject to greater vigilance and control. This responsibility is usually subjective, but in contractual liability variations may arise, depending on whether the contractual obligation whose breach would give rise to liability is in the nature of best efforts or to achieve results.

This group of professionals is governed by Decree 663 of 1996 (the Organic Statute of the Financial System (EOSF)),³⁶ which defines the participants in the market, their activities and their professional duties, as well as prohibitions and limitations on their activity. The EOSF also provides sanctioning regimes applicable to natural persons or institutions subject to supervision and control by the Financial Superintendence of Colombia (SFC),³⁷ the entity in charge of supervising organisations that participate in the financial market, and to which

31 CE, 3rd Section. 30 July 1992 Ruling. CP Daniel Suárez Hernández; CE, 3rd Section. 13 August 1992 Ruling. CP Daniel Suárez Hernández; CE, 3rd Section. 24 August 1992 Ruling. CP Carlos Betancur Jaramillo; CE 3rd Section. 18 April 1994 Ruling. CP Julio César Uribe Acosta; CE, 3rd Section. 10 April 1997 Ruling. CP Carlos Betancur Jaramillo.

32 CE, 3rd Section. 3 February 1995; CE, 3rd Section. 18 July 11997; CE, 3rd Section. 24 June 1997.

33 Article 167 of the General Procedural Code.

34 CSJ. 26 November 1986.

35 CSJ. 14 October 1959; Vásquez, Roberto. *La Prueba de la Culpa Médica*. Ed. Díkè, 1995: 176.

36 EOSF and its complementary regulations.

37 EOSF, amended by Law 795/2003. Articles 208–212. Financial activity in Colombia is additionally regulated by Decree 2555 of 2010, as amended; Law 1328 of 2009 (the Consumer Protection Regime); the legal newsletters issued by the SFC; and the applicable regulations of the Code of Commerce.

jurisdictional functions have been attributed. These sanctions are administrative, and their imposition does not preclude victims from initiating private actions, either civil or criminal, for the compensation of damage.

Several Supreme Court rulings are worth mentioning regarding the liability of financial institutions, although they do not present an organised set of criteria to determine liability. Some of the most recurrent issues are: payment of counterfeit or adulterated cheques;³⁸ breaches of direct debit agreements; abuses of dominant position in contracts,³⁹ in charging for financial services⁴⁰ and in criminal investigations of employees;⁴¹ unjustified reporting to credit bureaus based on the collection of a non-owed capital;⁴² and fraud in transactions through unusual channels.⁴³

Dissatisfied financial consumers increasingly tend to bring their lawsuits before the SFC because it offers a quick resolution and puts pressure on the financial institution, which in addition to being ordered to pay damages may receive a disciplinary penalty. The most frequent cases involve fraudulent operations through unconventional channels, credit card fraud and payment of counterfeit cheques.

iv Computer and information technology professionals

Computing and technology professionals are not subject to specific regulation. They are grouped under the category of ‘software engineers and related professions’ and, to that extent, their activity will be regulated by the same general rules applicable to all engineering professionals, defined by law as those that apply ‘the physical, chemical and mathematical sciences . . . to the use and invention of the subject’.

The most important legislation comprises Law 842 of 2003 and Law 1325 of 2009. Law 842 defines the engineering profession and indicates the requirements for these professionals to obtain their licences and practise lawfully. In addition, it establishes the functions of the National Professional Engineering Council, including the inspection, supervision and control of this professional practice. This body is also responsible for sanctioning the faults of these professionals in accordance with the procedure established in this Law and which may be initiated informally or by complaints filed by the public.

Law 842 establishes a code of ethics: the ‘framework of professional behaviour of the engineer in general’. This code contains some general duties that comprise the framework for professional behaviour, with an emphasis on the duty to guard and maintain the goods, valuables and information entrusted to them. The code of ethics does not deviate from the general duties that are required of all professionals, but it is particularly stringent in those cases where professionals undertake activities in which they fail to meet the minimum standard of conduct.

Any act or omission by an engineer, including software engineers, in breach of professional or legal duties, violation of the code of ethics or exercise of criminal activities is subject to disciplinary sanctions. And the victim may also pursue compensation for damage caused by software professionals, under the general rules considered above.

38 CSJ. Ruling of 8 September 2003. Exp. 06909.

39 CSJ. Ruling of 19 October 1994. Exp. 3972.

40 CSJ. Ruling on Class Action 22 April 2009. Exp. 00624.

41 CSJ. Ruling of 18 December 2009. Exp. 00758.

42 CSJ. Ruling of 5 August 2014. Exp. 3972.

43 CSJ. Ruling of 19 December 2016.

v Real property surveyors

Although property inspections can have multiple purposes, such as determining the boundaries of a site and preparing maps or reports, or establishing the limits of construction on a property, these tasks are exercised exclusively by the state, with the intention of creating or updating the cadastral registry.

In Colombia, the work of private property inspectors is only focused on commercial appraisal – that is, on inspecting a property to determine, under technical and economic criteria, its commercial value for different purposes.

The most important legislation in this matter is Law 1673 of 2013, which indicates all conditions under which the appraiser must operate, such as being registered in the Open Registry of Appraisers.

Law 1673 also establishes the Code of Ethics of Appraisers, which is ‘the framework of behaviour of the appraiser’, and violations of this Code are sanctioned. Appraisers’ duties include acting with ‘the utmost diligence’ in the matters they oversee, and maintaining the confidentiality of information related to their clients and the jobs carried out.

The same Law establishes that the appraiser is primarily an adviser and ‘guardian’ of the interests of his or her clients and must never act to the detriment of third parties. Although this mandate emanates from the general principle of acting in good faith, it is admirable that Law 1673 has expressly established this, highlighting the social importance of this profession.

In the case of appraisers, there is not only one disciplinary body. The Law permits the existence of several Recognised Self-Regulation Entities (RSEs) that, in addition to appointing assessors and contributing to the Open Registry of Appraisers, have sanctioning faculties regarding their members.

Finally, despite the merits of Law 1673, the adequacy of a system of inspection, monitoring and control of appraisers through RSEs is still at a very incipient stage (only one such entity has been created), and it is unknown how successful their coexistence may be.

vi Construction professionals

This group comprises all professionals who engage in construction. The general civil liability requirements explained in previous sections apply to these professionals, as do several other statutes,⁴⁴ including the statutes regarding each professional and technical career,⁴⁵ such as engineering⁴⁶ and architecture.⁴⁷ These regulations set out specific duties for construction professionals, who must comply with them to be considered diligent and careful. These duties tend to prevent the causation of damage, so their non-observance is construed as negligence, which gives rise to liability.

However, it does not imply that the professional responds exclusively to a subjective type of responsibility. Indeed, construction is considered a dangerous activity by Colombian case law and thus the general rule that negligence of the professional needs to be proven does not apply.

44 Law 9/1989, Law 388/1997 and complementary regulation (urban reform and territorial reorganisation); Laws 2 and 3 of 1991 (social dwelling); Law 546/1999 (the financial system for construction); and Law 400/1997 reformed by Law 1229/2008 (seismic resistant construction); and Law 1796/2016 (safe construction).

45 Law 14/1975.

46 Law 842/2003.

47 Law 435/1998.

Construction professionals are liable under the terms of Article 2060 of the Civil Code, which contemplates the rules applicable to the construction contract.⁴⁸ This Article, in its third paragraph, imposes on the constructor an obligation to achieve results, consisting of a 10-year construction warranty,⁴⁹ which is also set forth in the Consumer Protection Statute, which establishes that the constructor is liable for the stability of the construction for 10 years, but also for interior finishings for one year.⁵⁰ Further development of the 10-year warranty regime was included in Law 1796/2016, which raises construction quality standards, foresees obligations of vigilance and includes a compulsory insurance scheme for the stability of buildings. Law 1796/2016 was regulated by Decree 282/2019, which establishes that construction professionals may comply with the mandatory insurance scheme through a bank guarantee letter, a trust account, an insurance policy or any other instrument suitable to compensate property loss.

One must distinguish between an engineer working under a turnkey contract or delegated administration contract⁵¹ (and who is bound by the 10-year warranty and has an obligation to achieve results) and an engineer in charge of the soil survey, who is only liable if negligence is proven.

A final differentiation must be made with respect to the regime applicable to construction professionals when damage is caused in the exercise of a dangerous activity. In these cases, the construction professional is responsible under strict liability and can only be exonerated in the event of force majeure.

vii Accountants and auditors

The Colombian legal system considers accountants to be of great social relevance, particularly because they certify facts that come to their knowledge in the exercise of their duties, and because failure to offer reliable information can have significant economic consequences.

Law 43 of 1990, which regulates this profession, has instituted two bodies: the Technical Council of Public Accounting, in charge of the technical-scientific orientation of the profession; and the Central Board of Accountants, which works as a disciplinary court and ensures compliance with professional ethics, having sanctioning power for that purpose. The sanctions that can be imposed range from fines to the cancellation of the licence to practise as an accountant. However, behaviours that may constitute violations can be found in the professional code of ethics of Law 43. The code prohibits any alteration of the documents that serve as the basis for professional advice or accounting and auditing practice, or any lack of truth in opinions issued. In addition, it prohibits accountants from providing services for which they are not well suited, and from exposing their clients to unjustified risks; it also requires practitioners to avoid conflicts of interest.

Apart from the sanctions of the code of ethics, Articles 58, 207, 216 and 222 of the Colombian Code of Commerce sanction accountants for irregularities in accounting records, breach of confidentiality, negligent performance of their duties or failure to report an economic crisis within a company. The Colombian Tax Statute establishes sanctions for accountants who have been inaccurate in tax declarations they have signed.

48 This rule also applies to architects, according to Article 2061 of the Civil Code.

49 Solarte, Arturo. *El Régimen de Responsabilidad Civil de los Constructores en Colombia*. 2nd International Congress of Insurance Law. 2014.

50 Law 1480/2011, Article 8.

51 Arbitration award *Conavi v. Conconcreto*. 16 February 2004.

Finally, Article 42 of Law 222 of 1995 makes auditors responsible for damage caused to the company, shareholders or third parties by not preparing or publishing financial statements. Of course, on top of this, all other conduct outlined would be a source of professional negligence of accountants.

viii Insurance professionals

Although there are other professionals in this group, we will deal primarily with insurers and brokers, and with particular focus on insurers.

First, insurance professionals and their activity are regulated mainly in the Code of Commerce, the EOSF, Decree 2555 of 2010, Law 1328 of 2009, the Basic Legal Newsletter and the Basic Accounting and Financial Newsletter; the last two of these are the responsibility of the SFC, which is in charge of the inspection, surveillance and control of people who perform any activity in the Colombian financial system, including insurers.

Complaints can be lodged with the SFC against insurers for inadequate provision of a service or for breach of a legal or regulatory standard that falls within the SFC's remit. The SFC is also competent to sanction insurers in the event of a breach of standards, but as an administrative entity it cannot make decisions on a breach of contract, or order compensation or refunds. For the resolution of contractual disputes between a financial consumer and an entity of the same nature, the law has enshrined, among other things, the financial consumer protection action,⁵² which can be processed by an ordinary judge or by the SFC in exercise of the jurisdictional functions granted by the General Procedural Code.⁵³

Furthermore, there is a union called Fasesolda, which brings together insurance, reinsurance and capitalisation companies, and whose mission is to contribute to the development of insurance activity in Colombia by representing this sector before authorities and society in general in the formulation of policies and the promotion of insurance culture. However, unlike other bodies, it has no disciplinary powers or control over its members.

Finally, we note that there are no important deviations in the liability regime of insurance professionals.

III YEAR IN REVIEW

It has already been established above that professional negligence is an emerging concept in Colombian law. Moreover, its development is slow to the point that there are no major cases or publications from 2018 that should be highlighted here.

Nevertheless, on the basis of previous incidents (such as the fall in 2013 of Space, a residential development in one of Colombia's main cities, even if the lawsuits against the developers are still pending in court), we are witnessing higher standards being demanded from developers and builders, and even how the cities' administrative authorities have taken effective steps to prevent new tragedies by evacuating and tearing down buildings that do not meet the required standards.

52 Law 1480/2011.

53 Law 1564 /2012, Article 24.

In this sense, the tendency of the courts towards a strict liability regime for professionals is still very much at play, especially with regard to financial institutions, as it is suggested in an interesting article published by Sergio Rojas and Camilo Martínez in 2018.⁵⁴

IV OUTLOOK AND FUTURE DEVELOPMENTS

We still believe that jurisprudence will continue to evolve in cases involving construction and medical liability, although we cannot anticipate the same evolution for the other professions in the near future.

However, there may be an interesting surprise in the case of professional negligence of lawyers. The rulings issued by the Superior Council of the Judiciary are increasingly relevant, and it is likely that mistakes committed by lawyers will be brought before the civil courts in claims for damages.

⁵⁴ Rojas, Sergio and Martínez, Camilo. 'Without intention and without negligence: a new jurisprudential paradigm for banks' liability' in *Foro de Derecho Mercantil* No. 60, July–September 2018, Bogota, Legis.

DENMARK

Jacob Skude Rasmussen and Andrew Poole¹

I 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 complete 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.

As regards the standard of proof, there is no general rule and it is usually for the plaintiff to establish the standard,³ which is often done by asking the court to appoint an expert.

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 Act⁴ is the principal act for limitation periods, including claims pertaining to professional negligence. In general, the limitation period is three years,⁵ from breach of contract for contractual claims,⁶ or from when the negligent act occurred for non-contractual claims.⁷ If the plaintiff is factually unaware of the claim, the limitation period normally

1 Jacob Skude Rasmussen is a partner and Andrew Poole is a dispute resolution consultant at Gorrissen Federspiel. The authors acknowledge the valuable assistance of assistant attorney Morten Melchior Gudmandsen in producing this chapter.

2 For example, regarding lawyers, see Section 126 of the Administration of Justice Act, No. 1284 of 14 November 2018.

3 See Bo Von Eyben and Helle Isager, *Lærebog i Erstatningsret*, 8th ed. (Copenhagen: Jurist- og Økonomforbundets Forlag, 2015), p. 129f.

4 Act No. 1238 of 9 November 2015.

5 See Section 3(1) of the Limitation Act.

6 See Section 2(3) of the Limitation Act.

7 See Section 2(4) of the Limitation Act.

commences from when the plaintiff becomes or should have become so factually aware,⁸ but the period can only be extended in this way up to a maximum of 10 years (30 years for personal injury claims).⁹

iii Dispute fora and resolution

Depending on the profession, there are disciplinary boards, which assess whether a professional has or has not 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 such an assessment, a party can generally bring a claim before the Danish courts, and such a claim does not differ from other claims under Danish law. The Administration of Justice Act applies,¹⁰ and the claim normally begins at the competent district court. The court is not bound by a board's decision.¹¹

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.¹² 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,¹³ and one cannot be unduly enriched from a negligent act.

8 See Section 3(2) of the Limitation Act.

9 See Section 3(3)(1)–(4) of the Limitation Act.

10 Act No. 1284 of 14 November 2018.

11 For example, regarding accountants, see Lars Bo Langsted, Paul Krüger Andersen and Lars Kiertzner, *Revisoransvar*, 8th ed. (Copenhagen: Karnov, 2013), p. 500.

12 See Mads Bryde Andersen, *Grundlæggende Aftaleret*, 4th ed. (Copenhagen: Gjellerup Forlag, 2013), p. 100f.

13 See Vibe Ulfbeck, *Erstatningsretlige Grænseområder*, 2nd ed. (Copenhagen: Jurist- og Økonomforbundets Forlag, 2010), p. 113.

II SPECIFIC PROFESSIONS

Each profession is often distinct and complex in how it approaches professional negligence. For comparison purposes, the sectors below focus on details such as applicable legislation, professional bodies, standards of good practice, disciplinary and complaints boards, and insurance.

i Lawyers

The Administration of Justice Act sets out the conduct required of a lawyer, which includes completing a task thoroughly, in good conscience and with the appropriate client care.¹⁴ 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, which works for the interests of law firms, their owners and employees.

The Danish Bar and Law Society has a combined disciplinary and complaints board, a decision of which is, unusually, final for a client. In other words, only the lawyer can contest a case in the courts that has already been decided by the board.¹⁵

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 Healthcare¹⁷ 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 that work for the interests of their members; the example for doctors is the Danish Medical Association.

The Act sets out where 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 probable;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.

14 See Section 126 of the Administration of Justice Act.

15 See Sections 147d and 147e of the Administration of Justice Act.

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. 907 of 16 September 2009.

17 Act No. 995 of 14 June 2018.

18 See Section 20(1) of the Act on Complaints and Claims in Healthcare.

19 See Section 20(1)(1) of the Act on Complaints and Claims in Healthcare.

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.

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 Act²³ 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 the Danish Insurance and Pension Association, and the Finance Society (the latter for banks' employees). 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 insurance scheme that applies to the whole sector of computer and 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 Danish Insurance and Pension Association, 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 decided by the parties. If the case concerns data protection breaches, they can be forwarded to the Danish Data Protection Agency.

21 Subject to further qualifying factors, see Section 8 of Ministerial Order No. 488 of 3 May 2018.

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 Sundhedsvæsenet*, 2nd ed. (Copenhagen: Karnov, 2017), p. 383.

23 Act No. 457 of 24 April 2019.

24 See Sections 1 and 5 of the Financial Business Act.

25 For example, see Ministerial Order No. 1581 of 17 December 2018 on good business practice in real estate credit lending.

26 See Section 3(2) of Ministerial Order No. 653 of 30 May 2018.

27 Act No. 128 of 7 February 2014.

28 For example, see Section 279a of the Criminal Code, Act No. 1156 of 20 September 2018.

v Real property surveyors

Real property surveyors are not a specific profession in Denmark. Various professions cater for real property in Denmark and this section focuses on real estate agents and building experts.

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

As regards building experts, the relevant legislation is the Act on Licensed Building Experts with its related Ministerial Order.³² 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 comes under the Danish Enterprise and Construction Authority,³³ and 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.

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.³⁵

29 Act No. 526 of 28 May 2014, see Sections 1 and 2.

30 See Chapter 7 of the Act on Sale of Real Property.

31 See Section 4 of Ministerial Order No. 1537 of 9 December 2015.

32 Act No. 1532 of 21 December 2010 and Ministerial Order No. 1426 of 30 November 2016.

33 See Section 2 of the Act on Licensed Building Experts.

34 Act No. 1123 of 22 September 2015.

35 See Section 4(1)(5) of Ministerial Order No. 1426 of 30 November 2016.

vi Construction professionals

There is no general legislation under Danish law that governs the relationships between the parties in a construction project.³⁶ Instead, a government committee comprising both governmental and non-governmental members has developed sets of default general contractual conditions. Examples include a set for building and construction works and supplies (AB 18),³⁷ and a set for design and build contracts (ABT 18).³⁸

Section 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 of a professional quality. How this quality is assessed depends on each construction profession's requirements regarding applicable legislation, rules, guidelines, customs, etc.

Pursuant to Section 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.³⁹ However, further insurance can be made part of the agreement, and this was usually the case because the default set out in the earlier AB 92 and ABT 93 conditions was generally seen as insufficient.⁴⁰ It remains to be seen whether this practice will continue under the new AB 18 and ABT 18 terms.

Section 69 and Section 67 of AB 18 and ABT 18 respectively set out arbitration 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, and two others deal with construction professionals such as painters, masons and carpenters, where the cost of construction is not greater than 1 million kroner.

For a professional body, the Danish Construction Association is one that comments on new legislation and is an employers' organisation, comprising as members: major building contractors, small and medium-sized construction companies and manufacturers of building components.

vii Accountants and auditors⁴¹

The standard of good practice is influenced by applicable legislation, such as Section 361(2) of the Companies Act as regards accountants within limited liability companies⁴² and Section 16 of the Act on Approved Auditors and Audit Firms, which requires skills of accuracy and swiftness, as adapted to the particular task.⁴³ The standard is partly defined by the code of

36 See Torsten Iversen, *Entrepriseretten* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2016), p. 50.

37 AB 18 is intended to replace the earlier AB 92, which may still be agreed between parties.

38 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.

39 See Section 11(3) of both AB 18 and ABT 18. 'Usual' suggests the market standard.

40 See Torsten Iversen, *Entrepriseretten* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2016), p. 278.

41 For the purposes of this section, auditors fall under the description for accountants.

42 Act No. 1089 of 14 September 2015.

43 Act No. 1287 of 20 November 2018.

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 Account Practices Board,⁴⁴ 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 or more must have a minimum cover of 20 million kroner, per year.⁴⁵

viii Insurance professionals

Insurance companies are included in the Financial Business Act.⁴⁶ The Act on Insurance Brokerage applies to independent insurance brokers.⁴⁷ These brokers have a separate standard of good practice⁴⁸ 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 20(1) 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 9,325,475 kroner per negligent act and at least 13,801,703 kroner for the combined number of negligent acts, per year.⁴⁹

III YEAR IN REVIEW

The following are two recent cases concerning professional negligence. The first highlights the stringent requirements for finding negligence under Danish law and the considerations had when establishing these requirements. The second highlights a strict condition for obtaining damages, that of a direct causal link between the negligent act and the loss, and confirms a shift away from a trend that softened this condition, if negligence had been clearly found.

44 See Ministerial Order No. 727 of 15 June 2016, pursuant to Section 47 of the Act on Approved Auditors and Audit Firms.

45 See Sections 3(1)(6) 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.

46 See Section II.iii of this chapter.

47 Act No. 41 of 22 January 2018.

48 See Ministerial Order No. 455 of 30 April 2018.

49 The insurance rules are set out separately and in more detail at Section 3(1) of Ministerial Order No. 481 of 3 May 2018.

i Real property sector⁵⁰

The plaintiffs were members of a cooperative housing association and the defendant had assessed the value of the association's property.

As at the end of 2005, the defendant valued the property at 40 million kroner, which the plaintiffs used as a basis to transfer their shares. Owing to a neighbouring property's 2006 selling price, the plaintiffs rather valued the association's property at just over 85 million kroner, and claimed damages.

On appeal from the district court, the Eastern High Court gave judgment in 2018. The High Court found that valuations during 2005–2006 were subject to uncertainty owing to large and partly speculative sales, and that the defendant's calculation method had been used by assessors and experts, and there was no basis to find that it could not be used. Accordingly, the High Court held that the assessment had not deviated from what was professionally justifiable and acquitted the defendant.

In early 2019, the Supreme Court affirmed the High Court's decision, highlighting the stringent criteria required to find negligence in the case, namely there were fundamental errors or defects in the assessment, or that the assessment resulted in a manifestly incorrect valuation. After considering the relevant legislation and the guidelines from the Danish Association of Chartered Estate Agents, the Supreme Court found that there were no errors in the defendant's calculation method and that the valuation was not manifestly incorrect, owing to the sales uncertainty at the time.

The case not only confirms the high threshold when finding professional negligence, it also highlights the role of legislation and professional bodies' guidelines when a court establishes whether that threshold has been met.

ii Legal sector⁵¹

In 2006, the plaintiffs purchased a property for 2.275 million kroner, for which the defendant acted as their lawyer. The plaintiffs intended to use the property as a holiday home. As the property was in an all-year residence area, the municipality required the plaintiffs to regularise the property's use. The plaintiffs subsequently brought an action for damages.

Both the district court and the Eastern High Court found that the defendant had not proven that he had provided the plaintiffs with the necessary advice regarding the use of the property, and so found him negligent. The question for the Supreme Court concerned the amount of damages and it confirmed that the plaintiffs' loss must be determined on the basis of what would place them in the economic position they would have been in if correct advice had been given. The plaintiffs claimed the difference in the purchase and sale prices, and other costs such as for maintenance and for selling the property.

The Supreme Court found that, if correct advice had been given, the plaintiffs would have bought a similar property in the same area that could have been legally used as a holiday home. As the fall in value did not appear to arise from the property's use, and as the claimed maintenance costs would not have differed significantly from the costs for a holiday home,

50 Eastern High Court decision of 16 February 2018 in case No. B-642-17, reported in the Danish law journal on construction law: TBB 2018.483. Supreme Court decision of 27 March 2019 in case No. 119/2018, reported in the Danish weekly law reports: U.2019.2221 H.

51 Supreme Court decision of 29 November 2018 in case No. 49/2018, reported in the Danish weekly law reports: U.2019.840 H.

both did not result from the negligent advice and so were not payable. However, the court found that the costs for selling the property were a consequence of the negligent advice and so were payable.

The judgment highlights the strict condition that to succeed in obtaining damages, it is not sufficient that an adviser has acted negligently and that a loss has occurred, there must also be proven a direct causal link between the negligent act and the loss.

IV OUTLOOK AND FUTURE DEVELOPMENTS

The recent court cases emphasise the stringent requirements when finding liability and when obtaining damages in professional negligence cases in Denmark. Regarding the construction sector, it is still to be seen with interest how the new AB provisions, which came into effect last year, will influence cases. Lastly, 2019 saw the reporting of two large auditing firms to the Public Prosecutor for Special Economic Crimes owing to not warning authorities about potential money laundering risks at banks. The reporting is unusual because the Danish Financial Supervisory Authority is usually considered responsible for monitoring such risks, and a bank's auditor was not previously understood to bear this responsibility.

ENGLAND AND WALES

*Nicholas Bird and Bryony Howe*¹

I INTRODUCTION

i Legal framework

The core obligation of a professional is to provide services to its client with reasonable care and skill. Such a term is implied by statute² into the contract of retainer and usually arises concurrently in tort. A professional is rarely taken to have warranted to the client that it will achieve any particular outcome.

The scope of the professional's duty of care is determined by a combination of the terms of the retainer, the client's instructions and such matters as the relevant professional regulatory and legal framework may require. 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 is determined by reference to the quality of risk advice given by the professional (e.g., in respect of the likelihood of future adverse events occurring). In some cases, the courts have adopted very 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 is also significant: codes of conduct may be seen by the court either as the distillation of good practice or (sometimes) independently actionable where breached. Many professional regulatory arrangements also mandate a framework for client redress and compensation that exists alongside the courts. These frameworks tend to

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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.'

3 See *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

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. Coutu & Co* [2016] EWHC 2224 in the context of financial advisers.

5 See *Barker v. Baxendale Walker Solicitors (a firm) & Anor* [2017] EWCA Civ 2056.

adopt lower criteria for proof and are usually cost-free to the client.⁶ While these frameworks tend to be used for single, low-value claims, the applicable regulator may also have the power to require the professional to carry out a past business review, 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 significantly 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 quite 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 statutory and case law regime governing how this works, and there is a 15-year longstop provision.

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. It is also possible to extend the limitation period in certain other cases. If the case is based on the fraud of the defendant or where 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 is subject to more complex provision 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 (CPR), with Part 60 of the CPR and the related practice direction setting out procedure specific to the TCC. The TCC primarily deals with claims against engineers, architects, surveyors and accountants where the amount

⁶ For example, the Financial Ombudsman Service or the Legal Ombudsman.

in dispute is in excess of £250,000. 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 the 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. However, the arbitrator's decision is generally binding on the parties and there are usually 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 typically focus closely on these kinds of causation argument.

In addition, the courts have shown a marked reluctance to compensate for loss arising from risks that it was no part of the professional's duty to protect against.¹¹ A client is, therefore, usually taken to have accepted the risks of a transaction in respect of which he or she has sought no advice. This principle may require the court to make fine distinctions between

7 See *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

8 See *Perry v. Raleys Solicitors* [2019] UKSC 5.

9 See *Allied Maples Group Ltd v. Simmons & Simmons (a firm)* [1995] EWCA Civ 17, [1995] 1 WLR 1602.

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.

11 See *BPE Solicitors & Anor v. Hughes-Holland* [2017] UKSC 21, [2017] 2 WLR 1029.

the nature of advice and information provided by the professional.¹² The prominence of this principle when assessing a professional's liability tends to displace legal devices that are used elsewhere for limiting damages (e.g., arguments that loss is too remote or not sufficiently foreseeable).

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 control¹³ and, therefore, are not always effective; the second is that the professional's regulatory arrangements often prohibit or limit their use.¹⁴

II SPECIFIC PROFESSIONS

i Lawyers

The Law Society is an independent professional body that represents the 145,000 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 sets out its required standards for the profession in the SRA Handbook. 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. The SRA Handbook sets out a Code of Conduct for all solicitors and Disciplinary Procedure Rules.

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

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.

13 See the Unfair Contract Terms Act 1977 and, where the client is a consumer, the Unfair Terms in Consumer Contracts Regulations 1999.

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.

record any misconduct or breaches of compliance with the SRA Handbook, and self-report breaches promptly to the SRA. The SRA has statutory grounds to intervene in the running of a solicitors firm 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.

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 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 routine 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 and runs from the negligent event or (if later) the claimant's date of knowledge.

In negligence claims against clinicians, the claimant's most important remedy is damages, the aim being 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: (1) 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); (2) special damages are entirely case-specific to compensate a claimant for the 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, including: the General Medical Council (doctors), the Nursing and Midwifery Council (nurses), and the Health and Care Professions Council (for example, psychologists and radiologists). Each regulatory body will set standards and codes for their members; for example, the GMC's Good Medical Practice guidance 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 both take disciplinary action against a bank or financial institution that has contravened their rules. 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 computer 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; and (5) contract termination.

Information technology services will often include controlling or processing data. To the extent that this includes personal data, the impact of the General Data Protection Regulation (GDPR) is likely to need to be considered.

Article 24(1) of the GDPR requires that data controllers 'shall 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 shall 'implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk'. Breach of these requirements could lead to enforcement actions by the Information Commissioner's Office. It is also increasingly common that these requirements are written into contracts involving the control or processing of data.

The GDPR contains rights of recourse for individual data subjects (Articles 79 and 82) if their data is not processed according to GDPR requirements. Direct claims by data subjects against data controllers appear to be increasing (for example, *Various Claimants v. Morrison's* [2018] EWCA Civ 2239). This is likely to be a growing area of potential exposure to professional service providers controlling personal data.

v Real property surveyors

After a very quiet year in 2017, there was a marginal increase in claims relating to alleged negligent overvaluations in 2018, and this trend has continued into the early months of 2019. With increased uncertainty over what Brexit will mean for the housing market and the economy generally, there is an increased risk of housing repossession in the residential market and loss of income because of corporate insolvencies, forcing down values in the commercial sector. Past history shows that any fall in property values will almost inevitably lead to an increase in the number of valuations claims, so market conditions are ripe for 2019 to be a more challenging year for valuers.

In terms of case law, in October 2018, Birmingham County Court heard a claim brought by Michele Davis against Connells concerning whether Connells, when carrying out an inspection for the purpose of preparing a residential mortgage valuation for the lender, should have inspected the adjoining property and identified the existence of Japanese knotweed there. Connells accepted that they owed the claimant a duty of care, but the parties disagreed as to the scope of that duty and whether Connells had breached it. The surveyor accepted that he had not inspected the adjoining property but said that this was outside the scope of his duties when preparing a residential mortgage valuation report. Having considered expert evidence, the requirements of the Red Book as regards the preparation of mortgage valuation reports and the RICS information paper on Japanese knotweed, the court found that it was not part of Connells' duty when preparing the residential mortgage valuation to inspect the adjoining land. Absent a surveyor observing something that put them on notice of the need for further investigation, because it might affect the value of the subject property, the Red Book did not impose any obligation on a surveyor preparing a residential mortgage valuation to inspect adjoining properties. The court recognised the limitations of the mortgage valuation report and that the primary purpose of such a report was to advise the lender on the value of the property and whether it was sufficient to provide security for the proposed loan. The court also commented in passing that the extent of the inspection that the surveyor was obliged to undertake would be different if Connells had been retained to provide a more comprehensive report such as a homebuyer report or a full structural survey.

vi Construction professionals

The Grenfell Tower fire has had, and will continue to have, a significant impact on construction professionals. A large number of claims are expected against contractors and consultants involved in the design and construction of high-rise buildings that have cladding, where issues of compliance with building regulations will be hotly debated.

That debate will be affected by the conclusions of the government's ongoing review of the building regulations relevant to fire safety, led by Dame Judith Hackitt, which includes recommendations on the appropriate future regulatory system, seeking to ensure that a disaster on the scale seen in June 2017 does not occur again. Disputes are now arising over whether the cladding on other buildings will need to be replaced, with what, and at whose expense. Further, the focus has now developed beyond cladding to other issues related to fire safety, including fire doors and fire stopping between dwellings. There is, therefore, likely to be considerable focus on professionals whose job it was to specify materials for construction projects or to inspect the works to verify whether they complied with Building Regulations.

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 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 issue of recognised professional qualifications for statutory auditors is delegated by the FRC to the RQBs. 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 for 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, although all require their members have some form of professional indemnity insurance, including compulsory limits of indemnity and minimum terms.

At the time of writing, there are plans for the FRC to be replaced by a new regulator, the Audit, Reporting and Governance Authority (ARGA) following a review of the FRC's powers in 2018. The ARGA is intended to take over responsibility for licensing and regulating the large audit firms involved in public interest entity audits from the UK accountancy bodies, in particular the ICAEW.

viii Insurance professionals

Insurance professionals have been heavily scrutinised in recent years. The FCA's thematic review, a tough line taken by judges in negligence claims against brokers and the implementation of the Insurance Act have all 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 was a thorough exercise that investigated issues such as broker conflicts and the transparency of broker commission. The FCA's findings included real concerns in relation to conflicts and transparency. Insurance professionals are expected to reflect on how they manage any conflicts of interest within their business models and make necessary changes. It has not come as a great surprise that, since the review, there has been a lot of merger and takeover activity within the broker community.

Case law has further highlighted that brokers must understand (1) their client's business, (2) their client's insurance requirements and (3) the insurance that they are placing for their clients. Finally, 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. The cases of *Jones v. Environcom*, *Ground Gilbey v. JLT* and *Eurokey v. Giles* and, most recently, *Dalamd Limited v. Butterworth Spengler Commercial Limited*, provide good guidance for brokers in this area.

Insurance professionals must understand the Insurance Act, 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 has on the policies that it is placing for its client.

Finally, insurance professionals will be uncomfortably aware that the FOS limit has increased from £150,000 to £350,000 (for complaints after 1 April 2019). Coupled with the widening of the definition of 'eligible complainants' to the FOS, this could lead to an increase in attempts to make claims against insurance professionals through the FOS.

Brokers must truly understand the insurance that they are placing and the nature of the business for which they are seeking to procure insurance. The developments in case law, the Insurance Act and the FCA's thematic review have made this clear.

III YEAR IN REVIEW

The Supreme Court has provided further guidance on issues such as the assumption of responsibility and loss of chance in professional liability cases.

*BPE Solicitors and another v. Hughes-Holland*¹⁵ has perhaps slowed, but not brought an end to, claims dealing with the distinction between 'advice' and 'information'. The test is necessarily fact-dependent, and so claimants are still trying their luck with claims for the total loss suffered on a failed transaction. This has led to mixed results for the defendant professionals (see, for example, the finding that conveyancers may find themselves in the advice category as per *Main v. Giambrone & Law*¹⁶). One decision that has been welcomed by finance professionals, however, is *Manchester Building Society v. Grant Thornton UK LLP*¹⁷ where the Court of Appeal confirmed that it is only an 'advice' case if the professional is found to have guided the claimant's decision-making process. The Court went on to helpfully explain that if it is not clearly an 'advice' case, then it is an 'information' case. The auditors in that case had negligently advised the building society that it could apply hedge accounting in recording its interest rate swaps and mortgages. Causation was established when the building society demonstrated that it had relied on that advice when it purchased further swaps and advanced more loans. It was nonetheless held that the auditors did not guide the building society's entire decision-making process and so had negligently provided information, not advice. The building society was unable to establish that the losses claimed would not have been suffered had the information been correct; the losses (brought about when the building society was forced to sell the swaps at a loss) related instead to market forces for which the auditors had not assumed responsibility.

15 See footnotes 11 and 12.

16 [2017] EWCA Civ 1193.

17 [2019] EWCA Civ 40.

Dishonest claimants have also been a feature in recent key decisions. In 2019 the Supreme Court refused to allow a claim against lawyers for loss of a dishonest claim, and in doing so issued its first decision dealing with loss of chance principles in 14 years (see *Perry v. Raleys Solicitors*¹⁸). The judgment is a reminder that claimants must first establish causation on the balance of probabilities before turning to loss of chance principles. The court will conduct a full forensic examination of the facts and evidence in the underlying litigation in order to determine whether the claimant has discharged this burden.

Conversely, in *Stoffel & Co v. Maria Grondona*,¹⁹ the Court of Appeal allowed a solicitor's client to recover damages notwithstanding that the client had used the solicitors to enable her to commit mortgage fraud. This was the first time the Court of Appeal had applied the Supreme Court's 2016 illegality test (as per *Patel v. Mirza*) to a claim against professionals. The Court found that the solicitors had no knowledge of the fraud and their retainer was not central to the fraud. In a decision that has likely caused some consternation amongst professionals, the Court found that public interest was, therefore, better served by ensuring clients are not barred from seeking civil remedies from solicitors for negligence and breach of contract.

IV OUTLOOK AND FUTURE DEVELOPMENTS

The Data Protection Act 2018 came into effect on 25 May 2018. It sits alongside the European GDPR, and tailors the GDPR's application in the UK. The new regime increases the protection of the rights of individuals who trust organisations with their personal information. This in turn gives rise to increased obligations on professionals, particularly finance professionals and lawyers, where the control and processing of a significant volume of sensitive client data is fundamental to their practices. The GDPR has drastically increased the level of fines that can be levied in the event of a breach, and professionals will have spent 2017 and early 2018 rushing to both comply with the new regime and to advise their clients on the same. The extraterritorial effect of the GDPR means it will, at a minimum, continue to apply to UK organisations continuing to do business with the EU after (or, indeed, if) the UK leaves the bloc. The Information Commissioner's Officer is responsible for implementing the GDPR and is yet to issue any fines of the level anticipated by the regime, but it is early days. It is also expected that third-party claims against professionals for data breaches will increase. Reports in late 2018 suggested that some firms were providing inadequate or incorrect advice to companies on the transition and their obligations under the new regime, and so there is also potential for claims arising out of that advice.

Lady Justice Gloster's two-year disclosure pilot scheme has now been launched in the business and property courts with effect from 1 January 2019. This is contained within Part 51U of the Civil Procedure Rules. With an emphasis on early tailored disclosure, and a possible curtailment of standard disclosure altogether, Part 51U seeks to keep the costs spent on disclosure proportionate. Many of the duties dealt with in Part 51U will not be new to legal professionals, but they have been strengthened considerably: for example, there is an explicit obligation to cooperate and engage with the other side on disclosure from an early stage, particularly as to the use of technology, and the duty to disclose adverse documents is

18 [2019] UKSC 5.

19 [2018] EWCA Civ 2031.

accentuated. The scheme introduces explicit sanctions for non-compliance, and so it is not unlikely that we will see an increase in sanctions applications while the legal profession (to include the judiciary) comes to grips with the new scheme.

Witness evidence is expected to similarly undergo reform in the near future following the establishment of the Witness Evidence Working Group led by Mr Justice Popplewell. The working group has been tasked with reviewing the current rules (contained in CPR Part 31) and practices regarding factual witness evidence in the business and property courts, and to investigate possible alternatives (one suggested alternative is to abolish witness statements altogether). This follows recent judicial criticism of the utility of lengthy and costly witness statements produced years after the events versus relying on the available contemporaneous documents.

GERMANY

Martin Alexander and Carsten Hösker¹

I INTRODUCTION

i Legal framework

Professional liability primarily follows the rules German civil law recognises for contractual and tort liability in general. While there exist several codes containing specific rules for different professions, the German Civil Code (BGB) provides the core legal framework from a liability perspective. It contains the applicable rules regarding both liability on the merits in contractual (Section 280 et seq.) and in tort law (Section 823 et seq.) and the material rules for calculating the amount of damages (Section 249 et seq.).

The BGB generally requires faulty conduct by a contracting party or a tortfeasor in liability claims.

As one can see, it is a peculiarity of German civil law that it recognises a strict segregation between liability from contracts and from tort. While it is possible that the facts of the case establish liability from both legal doctrines at the same time, the legal requirements of both regimes are quite different. The most striking differences between both regimes are:

- a* the law assumes fault by a contracting party while the plaintiff has to positively show and prove the tortfeasor's fault; and
- b* contractual liability recognises damage consisting of pure financial loss, while tort liability only does so to a very limited extent.

German liability recognises strict liability, of course, but not necessarily in terms of professional liability – rather in such areas as product liability pursuant to the EU product liability directive, or motor liability.

The first question to be answered is whether an individual indeed breached a duty of care. This question is largely dependent on case law and there exists a vast multitude of judgments of German courts addressing various professions (e.g., doctors and other medical professionals, architects and engineers, lawyers, tax advisers and accountants, insurance brokers and banking professionals). Claims pursuant to tort law, however, are merely triggered if the tortfeasor violates certain 'absolute' legal positions (e.g., life, health, freedom, property) as defined by law. Thus, a breach of duty may lead to liability under contractual provisions, but not in tort. Needless to say, tort law only plays a role in certain areas of professional liability (e.g., medical malpractice and liability of construction professionals) while it is not applicable in other areas (e.g., insurance-broking malpractice and lawyers' liability).

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Once a plaintiff is able to establish a certain breach of duty, one has to consider whether this breach indeed resulted in the damage claimed by the plaintiff. This causation aspect is one of the most relevant issues in professional negligence litigation and the German Federal Court of Justice (FCJ) has decided on these matters several times. Since it has not always taken the same legal position, and, in particular, has resolved questions of onus and proof differently in different areas, such as lawyers' or banking professionals' liability, or in medical malpractice, the core issues of this very important aspect of professional liability are worth dealing with even at this stage.

As stated above, the client bears the onus of showing and proving causation between a breach of duty (especially wrong advice or omission of certain advice) and damage. The FCJ has acknowledged (from the early 1970s onwards, following a case that dealt with liability of an advertising agency)² that it will generally be difficult for plaintiffs to prevail in such litigation since it is nearly impossible to show and prove that one would have acted differently in full knowledge of the matter. The different senates of the FCJ have used different approaches to this issue. Some have taken the position that it is not incumbent on the plaintiff to show that it would have complied with the (omitted or wrong) advice provided by the defendant, and accordingly have proceeded on the assumption that the plaintiff would have complied, had the advice been rendered correctly.³ Some senates have taken the view that *prima facie* evidence rules are to be applied, which requires a situation that is suited to a generalised approach because of the circumstances at hand. According to the FCJ, this is the case when only one decision could reasonably have been made by the plaintiff, had correct advice been rendered to him or her.⁴ There might at first seem to be little difference in these positions, but the truth is that these different rules shift the onus onto the defendant significantly: if the legal assumption is made that the plaintiff would have complied with the defendant's advice (had it been given correctly), the defendant must strictly show and prove that this was not the case (which is usually impossible). If the court (merely) applies *prima facie* rules, it is sufficient for the defendant to show that there is no state of affairs that indicates a generalised approach, thus quashing the *prima facie* evidence.

A court will then determine whether a contracting party or a tortfeasor acted with fault, meaning at least a slight form of negligence is required. As described above, fault is assumed by law in contractual liability while the plaintiff has to positively show and prove the tortfeasor's fault. This distinction leads to different procedural requirements and eventually to a shift in the onus that can make the difference between winning and losing in litigation. Another notable difference is that a contracting party has to assume fault by its servants and auxiliary personnel while the tortfeasor is merely liable for its own conduct and only has to bear its own *culpa in eligendo*.

2 German Federal Court of Justice (FCJ), decision of 5 July 1973 – VII ZR 12/73, NJW 1973, 1688.

3 FCJ, decision of 22 November 1983 – VI ZR 85/82, NJW 1984, 658 (medical malpractice); same, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512 (banking professionals); Federal Constitutional Court, decision of 08 December 2011 – 1 BvR 2514/11, NJW 2012, 443 (banking professionals).

4 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; same, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494 (lawyers); same, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795 (lawyers and tax advisers); same decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447.

Common defences consist of contributory negligence by the plaintiff (or its servants and auxiliary personnel) and objections to the amount of loss alleged by the plaintiff. Those defences are available against both contractual and tort claims.

This is just a short introduction to the legal framework at hand, and to the most common legal issues that parties argue about. It is, however, safe to say that the applicable legal doctrines regarding liability differ considerably across the various professions, and these doctrinal differences are characteristic of the main legal questions – both material and recurring – that bear on the matter of liability in the different professions.

ii Limitation and prescription

Claims under German civil law are subject to limitation. There are several different limitation periods, but practitioners have seen an effort over the past few years to align those different periods to a similar standard to make the statute of limitations more predictable. However, a multitude of limitation periods is still in place, be it six months in certain claims arising from rental contracts, one year in certain commercial contracts, two years in warranty claims pursuant to sales contracts or even 30 years pertaining to rights *in rem*. The standard limitation period for liability claims is three years.

The standard limitation period depends on whether the plaintiff has gained knowledge of the defendant and of further circumstances establishing a claim. The three-year period commences on expiry of the year that the aforementioned requirements are fulfilled. However, to provide legal certainty, the law provides for a maximum limitation period of 10 or 20 years, depending on the violated right.

Other limitation periods merely depend on objective circumstances. For example, warranty and liability claims in sales contracts fall under the statute of limitations upon the elapse of two years after the good was handed over to the buyer (special rules apply to real estate).

Negotiations between the parties suspend the limitation period. Since it often is unclear when negotiations have begun and were eventually terminated, relying on this provision is usually not preferable. Parties would usually choose to waive the statute of limitations for a certain amount of time, which is legally possible. However, since German courts interpret this provision quite broadly, there is usually at least a short period, of a few days or weeks, in which the limitation period is suspended and the plaintiff given the time it needs to commence litigation.

German law recognises means by which limitation periods can be suspended for a longer period. These means suspend the limitation period and thus, ultimately, annul the defendant's potential objection that a claim has expired under the statute of limitations. The most usual means are by commencing litigation, entering into alternative dispute resolution (ADR) or serving third-party notices. Since the standard limitation period usually elapses at the year's end, it is often at this time of year that plaintiffs commence litigation. Third-party notices are an adequate procedural means for a defendant seeking to secure possible subrogation claims from becoming time-barred.

Limitation under German civil law is an objection (i.e., the defendant has to raise this objection to make it effective). The fact that a claim has expired under the statute of limitations does not need to be reviewed *ex officio* by the judge. In fact, if a claim is raised, even if it has obviously become time-barred – but the defendant does not raise this objection – the court will not (and is not even allowed to) dismiss the claim for this reason. The

legal theoretical effect of this is not that the claim will cease to exist but rather will become unenforceable. In practice, it does not make a difference except that the defendant has to plead limitation.

The legal term 'prescription' is (obviously) used with different senses in common law countries. It can mean acquisition of a right or of an obligation as a result of a certain amount of time having elapsed. It can, however, also be used in a negative sense, meaning that a claim ceases to exist after a certain time has elapsed. While German civil law recognises this concept (e.g., Section 13 of the Product Liability Act contains this rule), it does not play a role in professional negligence claims pursuant to common German contractual or tort law.

iii Dispute fora and resolution

The civil court system in Germany consists of county courts, district or regional courts, higher regional courts and the FCJ. The county courts deal with matters of a value up to €5,000, and certain areas of law regardless of the amount at stake (e.g., family law and rental law). Matters concerning an amount in dispute of above €5,000 have to be brought before a district court. County and regional courts are virtually the only courts of first instance. District courts also serve as appellate courts for decisions by county courts. The higher regional courts serve as appellate courts for appeals against county court decisions in family law and against all regional court judgments where the procedural requirements for lodging an appeal are fulfilled. They serve as courts of first instance in a very limited way only (e.g., for litigation pursuant to the Capital Markets Investor's Model Litigation Act). The FCJ only deals with appeals against appellate judgments (and very seldom with first instance decisions) and only on the legal aspects of a matter (i.e., it does not serve as a trial court). As professional liability claims usually involve damages in excess of €5,000, they are generally dealt with in a district court or – upon appeal – in a higher regional court. Most district courts have established special chambers (e.g., for medical malpractice cases). The FCJ has issued several decisions in various professional areas as well.

Various means of ADR are recognised in Germany, such as arbitration, mediation or ombudsperson procedures. However, none of these proceedings is mandatory (at least not in professional liability matters) before litigation in court is commenced. Since litigating cases in Germany is not extraordinarily expensive and legal costs insurance is common, there seems to be a smaller call for ADR (except in medical malpractice cases) than in other countries. Moreover, courts are bound by law to try to settle cases at every stage of litigation, and most courts offer mediation by specially qualified judges, thus there is simply no need to commence ADR proceedings when these means are addressed as part of litigation anyway.

Mediation through ombudspersons has become established in quite a number of areas over the past few years, especially since the Alternative Dispute Resolution for Consumers Act came into force. While ombudspersons existed beforehand and were active in professional liability cases, especially in insurance and banking, the past few years have seen an increase in ombudspersons acting in matters such as lawyers' professional indemnity (and fee disputes), investment funds or real estate. Decisions of those ombudspersons are binding only to a limited extent, usually dependent on the amount in dispute (e.g., below an amount of €15,000 or €5,000, depending on the respective ombudspersons' procedural rules). That said, since professional liability claims are generally higher than the aforementioned amounts, they are commonly litigated in the courts.

Civil litigation is predominantly governed by the German Act on Civil Proceedings (ZPO). While other codes, such as the German Act on the Constitution of the Courts are

also relevant, the ZPO covers all principal aspects. For example, it contains rules regarding the course of litigation (including all appeals) and the court's conduct, service of documents, requirements regarding the parties' submissions, means of taking evidence, rules regarding judgments (including appellate judgments) and their enforcement, rules on arbitration, and so on. As such, the ZPO is applicable to all professional liability claims litigated in court.

iv Remedies and loss

German civil law recognises a multitude of remedies, depending on the particular area of law.

The most important contractual remedy is 'performance'. A contracting party can claim for performance by its counterpart. In particular, in sales and working contracts when, under certain circumstances, it is possible to repeat performance of a contractual duty (usually when the original performance was not successful, e.g., the delivery of a purchased product), remedies for performance and repeated performance are relevant in litigation practice.

Many professional liability claims, however, are based on irreversible damage (e.g., injuries that cannot simply be undone or progressive diseases that have been overseen and have become untreatable in the interim). Claims for performance would be preposterous in such situations.

Basically, four remedies must be considered that may serve the plaintiff's desire best:

- a* avoidance (thus urging both parties to a contract to reconstitute all contractual performances);
- b* disclosure of certain information or documents;
- c* claim for damages (from contract or tort); and
- d* claim in restitution for unjust enrichment.

Avoidance and claims in restitution for unjust enrichment are certainly limited to rare occasions since they do not result in an award of damages, but in a 'reversed' performance. Disclosure and claims for damages are the remedies generally sought by plaintiffs – usually in an action by stages – since plaintiffs need disclosure of information or documents and use those to substantiate their claims for damages (e.g., in medical malpractice). German civil procedural law does not recognise discovery.

Where damages are concerned, it is important to know which damages a plaintiff may demand. Basically, German civil law differentiates between pecuniary (especially property and personal injury damages) and non-pecuniary loss (especially bereavement damages and damages for pain and suffering). Another categorisation differentiates between damages for positive interest and damages for preservation of the legal status quo (comprising negative interest and loss of integrity). Positive interest describes the plaintiff's interest to be awarded the equivalent of the promised bargain of a contract. Negative interest describes the plaintiff's interest to be awarded the loss resulting from the plaintiff's belief in a contractual declaration or avowal. Loss of integrity means the violation of the right to the integrity of certain legal positions (life, body, health, freedom, etc.), which is usually protected not only by contract, but also by tort law. German law recognises neither punitive damages nor 'bad-faith' claims.

It is usually incumbent on the plaintiff to show there was damage that resulted from professional faulty conduct. If the existence of damage or the amount of damages claimed by the plaintiff are in dispute, it is incumbent on the plaintiff to prove the facts in dispute. While the strict rules of proof pursuant to Section 286 ZPO apply, Section 287 ZPO contains relaxations of the aforementioned burden of proof that apply to the existence of damage and the amount of damages.

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Germany are bound to become members of the lawyer's chamber that supervises the area in which their firm or their office is located by way of compulsory membership. There are several chambers (one in each higher regional court's circuit, and a federal one). The relevant chamber gives advice to its member lawyers in, for example, fee disputes, disputes between lawyers, advice regarding employment, acquisitions of other firms and assessments of firm values. Furthermore, it represents the interests of its member lawyers in legislative and executive affairs, licensing questions and questions of education and training, and serves as the regulatory body for disciplinary affairs. Lawyers' courts are affiliated to each chamber, dealing with violations of rules of professional conduct.

The German Federal Code for the Legal Profession (BRAO) governs the profession itself, and the Rules of Professional Practice for Lawyers govern professional conduct. Moreover, lawyers' fees are regulated in the Scale of Lawyers' Fees.

All lawyers (and law firms) offering their services in Germany need to obtain and maintain compulsory insurance pursuant to Section 51 et seq. BRAO. All licensed liability insurers may offer professional insurance for lawyers, but it must fulfil the requirements of the aforementioned provisions. Section 51 et seq. BRAO, for example, provides for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The most relevant procedural effect of the lawyer's liability insurance being a compulsory insurance is that in cases of bankruptcy or where the policyholder vanishes, the plaintiff can commence litigation directly against the liability insurer pursuant to Section 115 of the German Insurance Contract Act (VVG), which is impossible otherwise.

As explained above, the FCJ has dealt with causation matters in different ways, and one way of handling this issue is to apply prima facie evidence rules. The FCJ senate, in particular, dealing with lawyers' professional liability is of the opinion that wrongful or omitted advice by a lawyer typically falls under the prima facie evidence rules. This doctrine is, however, inapplicable if, according to the lawyer's advice, more than one form of conduct is reasonable, since in that case a generalised situation leading to only one reasonable reaction on the plaintiff's part does not exist.⁵

Courts in the past applied the doctrine of 'secondary liability'. This doctrine dated back to case law of the Supreme Court of the German Reich⁶ and was adopted by the FCJ.⁷ This doctrine says that there is a duty of care for a lawyer to apprise its client of its own professional liability and on the statute of limitations that would apply in a claim against the lawyer. However, this obligation on the lawyer was justified by the fact that the BRAO recognised a special limitation that would be beyond the scope of the client's knowledge of the defendant and of further circumstances establishing a claim (unlike the current rules under the BGB, as mentioned above). Since the aforementioned special limitation has ceased to exist, it is doubtful that the doctrine of secondary liability still exists. On abrogating the

5 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; FCJ, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494; FCJ, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795; FCJ, decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447, and FCJ, decision of 22 June 1993 – XI ZR 215/92, NJW 1993, 2434 before the FCJ changed its position.

6 RGZ (civil law decisions of the Supreme Court of the German Reich), 158, 130.

7 FCJ, decision of 7 February 2008 – IX ZR 194/04, NJW 2008, 2041.

aforementioned special limitation, the new legislation explained that since the standard rules have become applicable and these are dependent on the client's knowledge, there was no call for the doctrine of secondary liability any more.

ii Medical practitioners

Medical practitioners in Germany are bound to become members of the medical practitioners' chamber that supervises physicians in their particular state (only the German state of North Rhine-Westphalia maintains two chambers, and there also is a federal chamber organised in the form of an unincorporated association). The chambers' areas of competence are similar to those of the lawyer's chambers.

The Federal Medical Practitioners' Act governs the profession (and especially the licence to practise medicine), and professional conduct is governed by the (Model) Professional Code for Medical Practitioners, which serves as a model for the (binding) Code of Professional Conduct of Medical Practitioners that each state chamber issues for its members. Moreover, physicians' fees are regulated in the Scale of Physician's Fees.

Those acts promulgated by the state chambers contain the requirement for medical practitioners to obtain and maintain 'sufficient' insurance cover. These provisions may serve as an order to obtain and maintain compulsory insurance (without explaining what 'sufficient' coverage means, but the minimum requirements of Section 114 VVG will apply in this case). The fact that the duty to obtain and maintain sufficient liability insurance is not enacted in an Act of Parliament but only in acts promulgated by the state chambers is sufficient to qualify the insurance as compulsory pursuant to Section 113 VVG as the respective states have empowered the chambers to impose the obligation (although this is contested in German literature with regard to some states). The legal effects of Section 115 VVG are the same as described in the chapter concerning lawyers above.

ADR plays a relevant role in medical liability cases. First of all, patients may ask their statutory health insurance to cover the issue of expert reports (at no charge) when they believe a physician's conduct has amounted to malpractice. Furthermore, the chambers have introduced arbitration boards that can conduct expert procedures upon the consent of both parties (patient and physician), thus giving parties an opportunity for early settlement; the results, however, are non-binding. These procedures are also free of charge for the patient, as the costs are borne by the medical practitioner's liability insurance.

Medical practitioners in hospitals are usually liable under tort law, and the patient's contractual partner – either the hospital or the medical practitioner who entered into a contract with the patient – is (additionally) liable under contract law. Any breaches of duty by employed physicians are to be attributed to its employer (usually a hospital) by law. German courts have developed a differentiated system of liability resulting from medical malpractice and from violation of the duty to inform the patient. Medical malpractice is established when a medical practitioner is in breach of medical standards that derive from medical science and clinical experiences, and this must be shown and proven by expert evidence in litigation. This breach of medical standards must cause damage to the patient's health in order to establish the physician's or hospital's liability. Liability from a breach of duty to inform the patient is led by the idea that a physician's medical intervention violates the patient's bodily integrity even if this conduct is *lege artis*. The intervention may be justified if the patient has given prior consent; this, however, requires prior and proper elucidation of the proposed medical procedure for the patient's benefit, which again requires an explanation of the general risks of the procedure, so that the patient may form an accurate picture of the medical intervention

that will be suffered. The level of detail to be provided to the patient depends on the medical indications for the planned intervention. The patient must then show and prove that the risk that was not explained to him or her has indeed been realised in the health damage suffered.

Medical malpractice litigation recognises some peculiarities especially regarding substantiation of a claim: the patient does not need to substantiate his or her claim in detail – it is sufficient to allege the facts establishing a claim. While the onus lies with the patient, the courts have developed an assumption of the physician's malpractice when entirely controllable risks materialise or when the physician's documentation in the patient's file is incomplete. Furthermore, the patient will usually not be able to show causation between the breach of duty and his or her health issues. Thus, the courts have developed a shift in the onus onto the medical practitioner in cases where the malpractice was grossly negligent or where the physician abstained from proper assessment of diagnostic findings. Ultimately, proper conduct regarding informing the patient is to be shown and proven by the physician.

iii Banking and finance professionals

Unlike lawyers, accountants, auditors, architects and medical practitioners, banking and finance professionals are not organised in chambers since the existence of chambers is first and foremost justified historically by the idea that certain professions complement governmental duties and responsibilities, and thus access to and the conduct of these professions should be properly monitored. From a regulatory perspective, that is not the case for banking and finance professionals. German civil law, however, recognises special banking law in several regulations contained in the German BGB and in other acts such as the Securities Trading Act or the Banking Act.

It is common that banking products (e.g., funds, company shares, derivative instruments or bonds) are sold by banks (through their employees) themselves, thus professional liability of banking and finance professionals is usually litigated against the bank itself. Any breaches of duty by those professionals are attributed to their employers, usually a bank. Besides, there exist other professionals engaged in selling banking products, such as investment brokers or financial services brokers (whose conduct is usually not attributable to a bank). Their professional conduct (especially the requirements to be fulfilled to obtain a licence) is governed by Sections 32 et seq. of the Banking Act and Section 34f/34h of the Trade, Commerce and Industry Regulation Act (GewO), depending on which type of business they specialise in.

Sections 34f, 34h and 34i GewO requires liability insurance for finance brokers, making this coverage compulsory pursuant to Section 113 et seq. VVG. The option under Section 33 Paragraph 1 Section 2 of the Banking Act to fulfil the statutory capital requirements by substitute insurance coverage does not qualify as compulsory insurance.

As explained above, the FCJ has dealt with causation issues in different ways, and one way of handling this issue is to concede to the plaintiff that it would have complied with the defendant's advice, had it been rendered correctly.⁸ The FCJ applies this doctrine in

8 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; same, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494 (lawyers); same, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795 (lawyers and tax advisers); same, decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447.

banking and finance professionals' liability.⁹ In 2012, the FCJ extended this judicial principle to professional liability in investment broking cases (and especially with regard to kickback fees).¹⁰

Another notable example of the FCJ case law regarding banking law and banking professionals' liability pertains to the FCJ's tendency to assume that contracting parties (bank and customer) enter into an advisory contract virtually upon the 'first meeting' of the parties. While German literature has discussed and criticised this standpoint multiple times for imputing to parties a non-existent will to enter into a contract,¹¹ the FCJ has adhered to this position so far and it has been upheld by the German Federal Constitutional Court.¹²

iv Computer and information technology professionals

There are no notable peculiarities regarding professional liability of computer and information technology professionals.

v Real property surveyors

There are no notable peculiarities regarding professional liability of real property surveyors, unless they are construction professionals.

vi Construction professionals

Architects in Germany are bound to become members of the architects' chambers that supervise architects in their respective states; the state chambers are members of the federal architects' chamber, which is organised as an incorporated association. The chambers' areas of competence are similar to those of the lawyers' and medical practitioners' chambers. There also exist engineers' chambers, which are assigned to the respective architects' chambers.

Individual state architect acts govern the profession itself, and a code of professional conduct issued by each state chamber governs professional conduct. Architects' and engineers' fees are regulated in the Scale of Architects' and Engineers' Fees. Ultimately, architects and engineers are subject to a multitude of federal and state laws (building codes, safety regulations, public procurement laws, etc.).

The situation regarding compulsory insurance is the same as that faced by medical practitioners: rules for compulsory insurance are not regulated in one specific law but in each applicable state law (because the professional architect's and engineer's law is state law for constitutional reasons). To a very limited extent, there exist rules for compulsory insurance of real property surveyors, mainly in eastern Germany.

The doctrine of secondary liability (which has probably ceased to exist in legal professions) is still applicable in the liability law of construction professionals. According to this doctrine, there is a duty of care for an architect or construction professional to apprise his or her client of building defects and the root causes of the defects, as well as the legal situation arising, even if that pertains to planning or supervisory errors by the construction

9 FCJ, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512.

10 FCJ, decision of 08 May 2012 – XI ZR 262/10, NJW 2012, 2427; same, decision of 15 March 2016 – XI ZR 122/14, NJW-RR 2016, 1187.

11 Cf. Emmerich in MünchKomm-BGB, vol. 2, 7th ed. 2016, § 311 margin No. 97 et seq.

12 Federal Constitutional Court, decision of 8 December 2011 – 1 BvR 2514/11, NJW 2012, 443.

professional himself or herself.¹³ Since the limitation of professional liability claims is (like the above-noted legal situation in legal professions) still independent from the client's knowledge of the defendant and of further circumstances establishing a claim, there still exists a necessity for this doctrine.

vii Accountants and auditors

Tax accountants and auditors in Germany are bound to become members of their respective chambers. There are 21 tax accountants' chambers, which supervise the area in which their firm or their office is located by way of compulsory membership. Furthermore, there exists one federal tax accountants' chamber and one federal auditors' chamber. The aforementioned chambers' areas of competence are similar to those of the lawyers' chambers, but, unlike the lawyers' chambers, they also execute and supervise the exams that must be passed to become a tax accountant or an adviser.

The German Tax Accountants Act governs the profession itself, and the Act of Professional Conduct of Tax Accountants governs professional conduct. Moreover, tax accountants' fees are regulated in the Scale of Tax Accountant's fees. The German Auditors Act governs the profession itself, as well as professional conduct and auditors' fees.

All tax accountants and auditors (and tax accountancy and auditing companies) offering their services in Germany must obtain and maintain compulsory insurance pursuant to Section 67 et seq. of the German Tax Accountants Act and Section 54 of the German Auditors Act. All licensed liability insurers may offer professional insurance for accountants and auditors, but it must fulfil the requirements of the aforementioned provisions. Like Section 51 et seq. of the German Federal Code for the Legal Profession, the aforementioned provisions provide for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The procedural effects of Section 115 VVG also apply.

The causation issues as explained in the chapter on lawyers' liability pertain to tax accountants' and auditors' liability as well since these professions' liability is supervised by the same FCJ senate as the lawyers' liability.

The secondary liability of tax accountants and auditors is likely to have ceased to exist as well pursuant to the same reasons as explained in the chapter regarding lawyer's liability.

viii Insurance professionals

Like banking and finance professionals, insurance professionals are – for the same reasons – not organised in chambers. German civil law, however, recognises special insurance law in several regulations contained in the VVG, the GewO and the German Insurance Supervision Act.

It is common that insurance products are sold by either insurance agents (usually as salesmen for one or a few insurers) or insurance brokers, who enter into a contract with the policyholder.

That differentiation is picked up in Section 6 VVG, which provides for duties of information and elucidation to be fulfilled by the insurer, except when the policyholder has entered into a contract with an insurance broker. Violations of Section 6 VVG give rise to

13 FCJ, decision of 26 October 2006 – VII ZR 133/04, NJW 2007, 365; same, decision of 10 October 2013 – VII ZR 19/12, NJW 2014, 206.

claims against the insurer itself. As insurers working with insurance agents usually fulfil their duties under Section 6 VVG through these insurance mediators, any breaches of duty by such persons are attributed to the insurer.

Section 61 et seq. VVG provide for the same duties to inform, and explain to, the policyholder, but these duties pertain to the insurance agent and insurance broker only. Any breach of these duties by insurance agents or brokers may give rise to claims against the aforementioned insurance mediators.

The professional conduct (especially the requirements regarding obtaining a licence) of both insurance agents and insurance brokers is governed by Section 34d GewO.

Section 34d GewO requires liability insurance for insurance agents and insurance brokers, making such coverage compulsory pursuant to Sections 113 et seq. VVG. The extent of the minimum coverage is regulated by Section 8 et seq. of the German Regulation on Insurance Mediation.

The causation issues explained in the section on banking and finance professionals' liability also pertain to insurance professionals' liability.¹⁴

III YEAR IN REVIEW

The BGB contains provisions for working contracts that, until the end of 2017, applied to architects' and engineers' contracts, under the FCJ's authority. In 2018, following new legislation, a completely revised law of building contracts entered into force. The most relevant provision regarding professional liability is the new Section 650t BGB, which addresses the following issue: since the 1960s, it had been a commonly held view in Germany that a contractor and the architect (despite legal concerns) are jointly and severally liable to the builder if the contractor executes a planning error by the architect, or if the architect fails to recognise faulty work by the contractor and fails to correct defects although the architect has been retained to supervise the work.¹⁵ This regime led to the problem that the builder could choose whom to make a claim against, the architect or the contractor. Since the contractor had a right to repeat its performance, the builder often instead raised direct claims against the architect and went for damages, thus effectively taking the chance to obtain repeat performance from the contractor, while coercing the contractor to satisfy the architect's internal subrogation claim that resulted from the joint and several liability pursuant to Section 426 BGB. Section 650t BGB now eliminates this flaw by granting the architect a right to deny the claim if the builder has not requested, unsuccessfully, repeat performance from the contractor beforehand.

The FCJ amended its decades-old regime dealing with damages arising from a building defect. While previously the builder was generally able to make a claim for correction costs even if the defect was not remediated, the FCJ has now taken the exact opposite view. In February 2018, the FCJ decided that builders can only make a claim for correction costs if indeed the defect was remediated. This is also the case for damages claims against construction professionals if the claim is based on planning or supervision errors that have already been

14 FCJ, decision of 22 May 1985 – IV a ZR 190/93, NJW 1985, 2595; same, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.

15 FCJ, decision of 01 February 1965 – GSZ 1/64, NJW 1965, 1175; same, decision of 22 December 2011 – VII ZR 7/11, NJW 2012, 1071.

executed in a building.¹⁶ Courts of first instance have been asked to extend this case law to other areas of law, such as sales law and tort law, and it will be interesting to see whether other senates of the FCJ (different senates are competent for different areas of law) will follow the VII senate in the future. The higher regional court Frankfurt already confirmed the rationale behind this decision is to be applied to sales law as well¹⁷ while the higher regional court Düsseldorf denied it.¹⁸ This situation makes it probable that the FCJ will deal with the matter sooner or later.

The FCJ amended its position in relation to tax adviser's liability at the beginning of 2017. It ruled that the tax adviser is liable for damages resulting from a delayed insolvency filing if the adviser's duty was to issue the annual financial statements and if, on the basis of the figures made available to the adviser or upon other indications, the adviser failed to point out to the board that the company might be on the verge of falling into bankruptcy.¹⁹

The FCJ decided that in the matter of insurance professionals' liability, claims in relation to damage resulting from improper claims handling are to be assessed pursuant to Section 280 BGB, not special provisions of the VVG, and that insurance brokers are generally obliged to support policyholders in claims handling. The insurance broker cannot defend itself by using the objection that the insurer had already advised the policyholder about obligations that must be fulfilled under German insurance law to maintain coverage (this concept differs significantly from the English concept of conditions precedent).²⁰ In a recent case concerning advice an insurance broker has to provide to its clients, the FCJ has clarified that the scope of advice required is very broad. The broker has to compare the benefits and downsides of a new policy with the provisions of the insurance coverage the client already maintains.²¹ Given that insurers and brokers developed a multitude of insurance terms, many of which are market standards in one or the other aspect, it is consequent that the FCJ has now lowered the bar for liability claims against insurance brokers.

IV OUTLOOK AND FUTURE DEVELOPMENTS

As explained in Section I, the FCJ has in the past shown inclinations to be quite consumer-friendly. There have not been any indications that this trend will stop in the near future.

For example, liability of legal advisers, especially lawyers, has been expanded significantly over the past few years. A notable judgment of the FCJ in 2015²² – despite claiming the opposite – overturned the Roman law axiom of *iura novit curia* in deciding that a lawyer has to not only accurately show the facts of the case, but also convince the court that its legal assessment is incorrect – and even rectify the legal errors the court is succumbing to, thus asking more from a lawyer than from the court itself. The FCJ continued this line of reasoning in a recent decision.²³

16 FCJ, decision of 22 February 2018 – VII ZR 46/17, NZBau 2018, 201.

17 Higher Regional Court Frankfurt, decision of 21 January 2019, 29 U 183/17, BeckRS 2019, 370.

18 Higher Regional Court Düsseldorf, decision of 09 October 2018, I-24 U 194/17, BeckRS 2018, 31442.

19 FCJ, decision of 26 January 2017 – IX ZR 285/14, NJW 2017, 1611.

20 FCJ, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.

21 FCJ, decision of 26 July 2018 – I ZR 274/16, NJW-RR 2018, 1301.

22 FCJ, decision of 10 December 2015 – IX ZR 272/14, NJW 2016, 957.

23 FCJ, decision of 18 October 2017 – LwZB 1/17, NJW 2018, 165.

This is just one example showing that the FCJ is prone to assume liability on the merits quite quickly – and thus allocate liability to professionals maintaining liability insurance.

It is, however, a completely different matter when it comes to amounts of damages awarded to plaintiffs in the past. While this issue is not exclusive to professional liability, it has certainly had some impact in this area, and especially in relation to medical malpractice. Traditionally, German courts have been reluctant to award extensive damages for pain and suffering. Seldom has a German court awarded damages for pain and suffering in excess of €500,000. This Pandora's box could, however, be opened in the near future in the wake of new legislation regarding damages for pain and suffering for survivors: pursuant to German law *de lege lata* until mid-2017, survivors could not be awarded damages for pain and suffering had they not suffered a condition that culminated in shock or even in their own injury. Suffering the 'usual' feelings that attend the loss of loved ones was not deemed sufficient. The aforementioned new legislation now dispenses with personal shock or injury as a requirement to be awarded damages for pain and suffering upon injury or death of loved ones (although harm from shock or bereavement may still be incurred). Legal professionals will have to wait and see if this new law will lead to a more liberal handling of damages for pain and suffering, and in turn lead to new 'record-breaking damages' in the near future. In a very recent decision,²⁴ however, the FCJ denied damages for pain and suffering of heirs of a patient that was kept alive by doctors even though he was multimorbid and unable to communicate due to dementia. Where instance courts had awarded damages because the patient (who had not issued a patient's provision) was alleged to have suffered needlessly, the FCJ held that life as such cannot be seen as a cause for damages. This does not necessarily reflect upon future decisions in regard to the amount of damages awarded, but it shows that a certain reluctance concerning damages for pain and suffering is still ingrained in the German legal system.

It will be interesting to see how – and if – the downside of these developments will be absorbed by the insurance industry. In the face of constantly increasing claims expenditures in relation to medical malpractice, some well-known insurers have retreated from that business. This has led to discussions in Germany as to whether and how medical malpractice coverage, especially in obstetric medicine, will sustain in the years to come.

24 FCJ, decision of 2 April 2019 – VI ZR 13/18, BeckRS 2019, 6883.

IRELAND

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I INTRODUCTION

i Legal framework

General grounds for professional liability and their legal bases

The main grounds for a claim concerning professional liability are breach of contract, negligence and breach of fiduciary duty.

Negligence

The primary line of authority for professional negligence claims stems from the UK decision of *Bolam v. Friern Hospital Management Committee*² as approved in Ireland by *Ward v. McMaster*.³ The standard of care applicable in professional negligence cases is by reference to the 'ordinary skilled man exercising and professing to have that special skill'.

Contract

There is an implied term that a professional will exercise reasonable care and skill in providing services to the client. The scope of the services to be rendered will usually be defined in the contract and disputes frequently arise where there has been an element of 'mission creep'.

Fiduciary duty

Some professions also owe fiduciary duties to their clients, such as a duty of confidentiality. These may arise where the relationship is one of trust and loyalty. A plaintiff can claim equitable remedies in the event of a breach of fiduciary duty.

Limitations on the extent of the professional's liability

Professionals may limit their liability with regard to the contractual obligations owed to their clients. This can be done, for example, by way of exclusion clauses, clauses limiting the scope of the duty or indemnity clauses.

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2 [2000] Lloyd's Rep PN 823.

3 [1989] ILRM 400.

Common defences to a liability claim

Defences

A defendant may defend a professional negligence claim by establishing that one of the required elements of negligence was not present. The defendant can argue that the service provided was of a reasonable standard, or that the defendant's actions did not cause the damage complained of. The defendant may also argue that the particular duty of care owed did not extend to cover the damage complained of, as it was outside the terms of the retainer. A professional has a duty to protect the client's interests and carry out instructions in the matter to which the retainer relates; however, this duty does not extend to advising on unrelated matters. While this principle can limit the scope of the obligations arising in contract, it does not prevent a duty from arising in tort.

It should be noted that compliance with an accepted practice will not always provide a full defence, and the fact that a practice is universal within a profession will not of itself protect the professional concerned from liability (*Roche v. Peilow*,⁴ *ACC Bank Plc v. Johnston*,⁵ *Kelleher v. O'Connor*⁶).

Partial defences that reduce the level of costs awarded

Section 34 of the Civil Liability Act 1961 provides for apportionment in cases of contributory negligence. The court can reduce damages owed to a plaintiff as 'the Court thinks just and equitable, having regard to the degrees of fault of the plaintiff and the defendant'.⁷ Further, claimants must mitigate their losses, which is a question of fact as opposed to one of law.

Finally, while not strictly a defence, a professional may also be in a position to seek a contribution or indemnity from another party or a 'concurrent wrongdoer', pursuant to the Civil Liability Act 1961. Two or more persons will be concurrent wrongdoers where they are liable to the same party in respect of the same damage. This commonly arises in cases involving construction professionals.

ii Limitation and prescription

Time limits

The Statute of Limitations 1957 (as amended) prescribes the time limits applicable to professional negligence claims. These time limits run from the date the cause of action accrued except in cases of concealment, fraud or mistake, where the limitation periods may be extended. A plaintiff that has a cause of action in both contract and tort is entitled to pursue whichever claim provides the most advantageous limitation period.⁸

Contract

Generally, there is a six-year time limit to institute proceedings based in contract, from the date on which the cause of action accrued, unless otherwise provided in the contract. A 12-year limitation period operates for contracts executed as a deed.

4 [1985] IR 232.

5 [2010] 4 IR 605.

6 [2010] IEHC 313.

7 *Carroll v. Clare County Council* [1975] IR 221.

8 *Finlay v. Murtagh* [1979] IR 249.

Tort

A six-year time limit applies to bring an action in tort, from the date on which the cause of action accrued. In the case of a personal injury claim against a medical professional, a two-year time limit applies.

iii Dispute fora and resolution

Courts or tribunals in which professional liability claims are in general brought

The jurisdiction in which court proceedings are brought will depend on the monetary value of the claim. The District Court has jurisdiction over claims up to €15,000, and the Circuit Court deals with claims with a value of up to €75,000 (or €60,000 for personal injury claims). Claims with a value in excess of this limit are heard by the High Court, which has an unlimited monetary jurisdiction. Each court has its own set of procedural rules.

High-value professional liability claims may also potentially be heard by the Commercial Court, a fast-track division of the High Court established to deal exclusively with disputes of a commercial nature valued in excess of €1 million. Cases in the Commercial Court are case-managed and tend to progress at a much quicker pace than other High Court cases.

Alternative dispute resolution

Professional liability disputes may also be dealt with by way of alternative dispute resolution (ADR) and it is common for contracts to require disputes to be determined by ADR. Mediation and arbitration are the most common forms of ADR used in Ireland; however, conciliation and adjudication are common in construction disputes. Conciliation is similar to mediation, except that the parties can opt for the conciliator to issue a binding recommendation. Other forms of ADR, such as expert determination and early neutral evaluation, are also available but less commonly used.

In addition, following the Mediation Act 2017, any court may adjourn legal proceedings on application by either party or of its own initiative to allow the parties to engage in mediation. Failure by either party to engage in ADR following such a direction can result in that party being penalised in relation to costs. Further, solicitors must now advise their clients of the option of mediation prior to issuing proceedings.

In Ireland, the law on arbitration is codified in the Arbitration Act 2010, which incorporates the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator's decision is binding on the parties and there is no means of appeal. Where parties have entered into a valid arbitration agreement, the courts are obliged to stay proceedings. Ireland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, allowing Irish arbitral awards to be enforced in any of the 157 countries party to the Convention.

The Construction Contracts Act 2013 provides for adjudication in construction disputes regarding payment. The Act applies to all construction contracts entered into after 25 July 2016. Adjudication has the benefit of providing a decision within 28 days of the referral to adjudication (or 42 days if the referring party agrees to this extension). The decision will bind the parties until the dispute is finally settled, such as by arbitral award or a decision of the court.

iv Remedies and loss

Types of remedies

There is a range of remedies available in professional negligence claims, including orders for specific performance, rescission and declarations, as well as interim remedies such as injunctions. Damages, however, are the primary remedy sought.

The method of assessing loss and damage

Calculating loss

Generally, damages for a contractual claim should place the plaintiff in the same situation, in monetary terms, as if the contract had been performed. The courts have developed various means of assessing damage in professional negligence claims. The expectation approach involves assessing the actual financial position of the plaintiff against the position the plaintiff expected to be in as a result of the advice given or the service received.

The decision of the House of Lords in *Banque Bruxelles SA v. Eagle Star (SAAMCo)*⁹ has been applied in Irish cases, particularly concerning solicitors' negligence. In that case, the House of Lords held that where a person is under a duty to take reasonable care to provide information on which someone else would decide on a course of action, that person is, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

Further, the 'no-transaction' approach to damages has been adopted in a number of cases to compare the actual financial state of the plaintiff with the position it would have been in had it not been provided with the allegedly negligent advice or service.¹⁰

II SPECIFIC PROFESSIONS

i Lawyers

Barristers and solicitors are regulated by separate professional bodies. However, the Legal Services Regulation Act 2015 establishes a new Legal Services Regulatory Authority (LSRA), which (once the Act is fully commenced) will regulate the provision of legal services by all legal practitioners. The only sections of the Act that are currently commenced relate to the establishment of the LSRA and public consultations, and consequently solicitors and barristers continue to be regulated separately pending commencement of the relevant provisions. The Law Society of Ireland anticipates that a number of Sections are due to be commenced in the second quarter of 2019, in particular the Sections relating to regulations allowing for limited liability partnerships (LLPs) and legal partnerships formed between two or more legal practitioners, one of whom is a barrister. The provisions that make it a criminal offence to provide legal services as a practising barrister without being entered on the Roll of Practising Barristers are also expected to commence shortly. The Law Society has also confirmed that the LSRA is in the process of drafting regulations regarding barristers' professional indemnity insurance.

9 [1997] AC 191.

10 For example, *Kelleher v. O'Connor* [2010] 4 IR 380, *ACC v. Johnston* [2011] IEHC 376.

Solicitors

Professional bodies and key regulatory and disciplinary codes and bodies

Solicitors are currently regulated by the Law Society of Ireland pursuant to the Solicitors Acts 1954 to 2015. The Law Society investigates complaints, including allegations of excessive fees, misconduct or inadequate professional services. The Complaints and Client Relations Committee can uphold or reject a complaint, or direct the solicitor to take certain steps, including paying compensation of up to €3,000. The Committee may also refer the solicitor to the Solicitors Disciplinary Tribunal, an independent statutory tribunal that considers complaints of misconduct. A client may also go directly to the Tribunal. The Tribunal may direct restitution of up to €15,000 and may refer its finding to the president of the High Court, who will determine the sanction to be imposed on the solicitor.

Compulsory insurance scheme

Solicitors must maintain a minimum level of professional indemnity cover of €1.5 million for every claim, excluding defence costs, as prescribed by the Solicitors Acts 1954 to 2015 (Professional Indemnity Insurance) Regulations 2017 (as amended). The Regulations also set out additional minimum terms and conditions required in a solicitor's professional indemnity policy. Cover may only be provided by 'participating insurers' with a minimum financial strength rating of BBB.

Barristers

Professional bodies and key regulatory and disciplinary codes and bodies

Barristers are regulated by the Bar Council of Ireland. The Barristers' Professional Conduct Tribunal hears complaints of misconduct but does not consider claims regarding professional negligence, which are dealt with by the courts. The Tribunal can uphold or reject a complaint and can suspend or disbar a barrister, require return of the client's fee and impose a fine or a caution. It cannot award compensation. Decisions can be appealed to the Barristers' Professional Conduct Appeals Board.

Compulsory insurance scheme

The Bar Council Code of Conduct requires barristers to have professional indemnity insurance, currently set at €1.5 million (any one claim).

ii Medical practitioners

Professional bodies and key regulatory and disciplinary codes and bodies

Medical Council

Doctors practising in Ireland are regulated by the Medical Council, which maintains a register of practitioners, sets standards for professional competence and investigates complaints. The Preliminary Proceedings Committee (PPC) considers all complaints that are made to the Medical Council. If there is a prima facie case to warrant further investigation, the PPC must refer the complaint to the Fitness to Practise Committee (FTPC) for a Fitness to Practise Inquiry. If the complaint does not warrant further investigation, the PPC will dismiss the complaint. It is also open to the PPC to make other directions, such as referring the dispute for mediation or referring the doctor to another body or a professional competence scheme. If the complaint proceeds to a full inquiry, the FTPC may recommend: a written censure,

a fine not exceeding €5,000, attaching conditions to registration, suspending or cancelling registration, or prohibiting the doctor from applying to have his or her registration restored for a certain period.

Nursing and Midwifery Board of Ireland

The Nursing and Midwifery Board of Ireland (NMBI) is the independent statutory organisation responsible for regulation of nurses and midwives and its functions are defined in the Nurses and Midwives Act 2011. The NMBI complaints procedure is very similar to the Medical Council procedure, as are the available sanctions. All complaints are initially sent to the PPC and transferred to the Fitness to Practise Committee for inquiry where required.

Dental Council of Ireland

The Dental Council of Ireland (DCI) is the regulatory body for the dental profession, created under the Dentists Act 1985. Dentists must be on the DCI register to practise dentistry. Private patients may complain to the Dental Complaints Resolution Service (DCRS), a voluntary service that offers a free mediation service; however, patients must first raise their complaints with the dental practice concerned. Serious complaints and issues relating to fitness to practise may be referred to the DCI by the DCRS, or by patients. In addition, public patients may complain to the Health Service Executive (HSE) Complaints Officer and, if this outcome is not satisfactory, the patient may seek a review from the HSE's Director of Advocacy, or complain to the Office of the Ombudsman.

Pharmaceutical Society of Ireland

Pharmacists and pharmaceutical assistants must be registered with the Pharmaceutical Society of Ireland (PSI), whose functions are prescribed under the Pharmacy Act 2007. Each pharmacy must have a superintendent pharmacist and a supervising pharmacist, each of whom must have at least three years' experience. Complaints may be made to the PSI and the procedure is similar to that of the Medical Council, with complaints going to the PPC. If further action is warranted, the complaint will go to mediation or to either the Professional Conduct Committee or the Health Committee for an inquiry (depending on the nature of the complaint). At the conclusion of the inquiry, the committee will prepare a report containing the evidence presented and the committee's findings. The PSI Council can then decide what, if any, sanctions to impose.

Compulsory insurance scheme

The Medical Practitioners (Amendment) Act 2017 requires registered doctors to obtain medical indemnity insurance, except in certain circumstances. The Act only affects doctors in private practice, as practitioners working in the public health service (including private consultants practising in public hospitals) are covered under the state's Clinical Indemnity Scheme, which also covers nurses and midwives. Under the NMBI Guidelines, nurses must have professional indemnity insurance. Nurses working in private practice may be covered by their employer's insurance, and the Irish Nurses and Midwives Organisation Medical Malpractice Scheme provides cover for members who are self-employed or employed outside the public sector. Dentists are required to hold appropriate professional indemnity cover.

Matters varying from Section I or matters from Section I specific to each group of professionals

Medical negligence claims must be brought within two years of the date of injury or negligence or the date of knowledge that an injury or negligence has occurred. This time limit does not apply to cases involving injuries to minors. In general, medical practitioners will not be found negligent if they have followed a general and approved practice; however, practitioners cannot rely on a general and approved practice with inherent defects that ought to be obvious to any person giving the matter due consideration. If the claim is based on the fact that the practitioner has deviated from a general and approved practice, it must be proved that the course taken was one that no medical practitioner of similar specialisation and skill would have followed, taking ordinary care.

iii Banking and finance professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Central Bank of Ireland

The Central Bank is responsible for the regulation and supervision of financial services firms. It has the power to conduct investigations, issue warnings, impose conditions on licences, revoke licences or impose administrative sanctions. As part of the Central Bank's Fitness and Probity Regime, it has enforcement powers against individuals found to be in breach when carrying out controlled functions within a financial institution. Finance professionals may appeal certain Central Bank decisions to the Irish Financial Services Appeals Tribunal.

Financial Services and Pensions Ombudsman

Consumers may lodge complaints against a financial services provider or pension provider with the Financial Services and Pensions Ombudsman (FSPO) (formerly two separate bodies, the Financial Services Ombudsman and the Pensions Ombudsman). The FSPO can resolve the matter informally through mediation or provide formal complaint resolution, which is legally binding and may be appealed to the High Court. The FSPO may award compensation of up to €52,000 per year where the subject of a complaint is an annuity, and €500,000 for all other complaints. These levels came into effect on 8 May 2018 and represent a significant increase from the previous maximum award of €250,000. The governing legislation of the FSPO, the Financial Services and Pensions Ombudsman Act 2017, allows the FSPO to publish decisions made, and in January 2019 the FSPO published, for the first time, 228 of the 234 legally binding decisions issued during 2018. In addition to publishing the full decision, the FSPO also published a 'Digest of 2018 Decisions', consisting of short summaries of selected decisions. In March 2019, the FSPO published a report entitled 'Overview of Complaints 2018', which sets out that of the 5,588 complaints made in 2018, 56 per cent related to banking products and 33 per cent related to insurance.

Compulsory insurance scheme

Investment intermediaries (under the Investment Intermediaries Act 1995) are required to hold adequate professional indemnity insurance of €1.25 million per claim and €1.85 million aggregate cover per annum (as set by the Insurance Mediation Directive). Compliance is monitored by the Central Bank.

iv Real property surveyors

Professional bodies and key regulatory and disciplinary codes and bodies

Society of Chartered Surveyors Ireland

The Society of Chartered Surveyors Ireland (SCSI) is the competent authority for the registration of quantity surveyors and building surveyors under the Building Control Act 2007, and is responsible for regulating its members. Failure to comply with SCSI by-laws may result in an action being taken by the Director of Regulation and the Professional Conduct Committee.

Property Services Regulatory Authority

The Property Services Regulatory Authority (PSRA) is responsible for licensing and regulation of property services providers (including property managers and auctioneers), including the investigation and adjudication of complaints. If the PSRA determines that a provider has engaged in improper conduct, it may caution the provider, revoke or suspend the provider's licence or impose penalties up to €250,000. Additionally, the Property Services Regulation Act 2011 introduces offences such as providing property services without a licence, obstructing an investigation or mismanaging client funds. These offences carry penalties of up to €5,000 or 12 months' imprisonment on summary conviction, or both, or fines of up to €50,000 or five years' imprisonment on indictment, or both.

Compulsory insurance scheme

The SCSI requires members to ensure all work is covered by adequate and appropriate professional indemnity insurance cover.

The Property Services (Regulations) Act 2011 and the Property Services (Regulation) Act 2011 (Professional Indemnity Insurance) Regulations 2012 impose a minimum level of professional indemnity insurance of €500,000 for all property services providers licensed with the PSRA.

v Construction professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Royal Institute of the Architects of Ireland

The Royal Institute of the Architects of Ireland (RIAI) is the regulatory and support body for architects, and the official registration body under the Building Control Act 2007. It produces codes of conduct and standards, and complaints regarding poor professional performance may be made to the Professional Conduct Committee.

Engineers Ireland

Engineers Ireland is responsible for the maintenance and development of professional conduct and standards for its members, as well as for enforcement and disciplinary actions. While membership is optional, the title of chartered engineer is reserved to members of Engineers Ireland. Complaints may be made to the Registrar of Engineers Ireland. The Registrar can refer the complaint to the Ethics and Disciplinary Board, which is responsible for enforcing the Code of Ethics. It will appoint an investigative and disciplinary panel to investigate and adjudicate on a complaint of professional misconduct. The panel may require an undertaking

from the member not to repeat the conduct complained of, issue a reprimand or suspend or exclude the member from membership. The panel may also require a contribution towards the costs of the investigation and adjudication.

Compulsory insurance scheme

The RIAI requires practising members to hold adequate and appropriate levels of professional indemnity insurance.

Members of Engineers Ireland must comply with the Code of Ethics, which obliges them to maintain appropriate professional indemnity cover.

vi Accountants and auditors

Professional bodies and key regulatory and disciplinary codes and bodies

Irish Auditing and Accounting Supervisory Authority

The Irish Auditing and Accounting Supervisory Authority (IAASA) is responsible for supervising the manner in which the prescribed accountancy bodies regulate their members, including admissions, licensing, complaints, investigations and appeals. It also conducts inspections of auditors and audit firms, investigates auditors and can impose sanctions. The IAASA introduced the Ethical Standard for Auditors (Ireland) 2017, an auditing standard for use in Ireland under licence from the Financial Reporting Council in the UK.

Chartered Accountants Ireland

There are numerous accountancy bodies in Ireland, but Chartered Accountants Ireland (CAI) is the dominant body responsible for regulating members of the audit and accountancy professions. It handles complaints and takes disciplinary action against members, including for misconduct and poor professional performance.

While the CAI Council remains responsible for the regulation and disciplining of members, the CAI established the Chartered Accountants Regulatory Board to oversee the fairness, impartiality and integrity of the regulatory responsibilities of the CAI.

Compulsory insurance scheme

The Companies Act 2014 (Professional Indemnity Insurance) (Liquidators) Regulations 2016 require liquidators (regulated by the IAASA) to hold professional indemnity insurance. The Regulations require a cover of €1.5 million for each and every claim, plus defence costs, provided that this level of insurance is commensurate with the value and nature of the work undertaken by the liquidator.

The CAI requires all members to ensure they are covered by their firm's professional indemnity insurance policy. The CAI's Public Practice Regulations set a minimum level of aggregate cover of €2.14 million with some exceptions available. In addition, the CAI's Public Practice Regulations were amended in October 2018 to reflect the requirements of the Insurance Distribution Directive. This amendment provides that, if a firm is a licensed firm or a firm authorised by the Financial Conduct Authority (or any relevant successor body) to conduct insurance distribution activities, then the minimum limit of indemnity required for those activities must be equivalent to at least €1.25 million for any one claim and €1.85 million in total per annum. This may form part of, or be in addition to, the minimum limit of indemnity required for the firm's other activities. Failure to adhere to this requirement will result in disciplinary action.

vii Insurance professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Central Bank of Ireland

The Central Bank is responsible for the prudential supervision of insurance and reinsurance undertakings authorised in Ireland. Undertakings must be authorised by the Central Bank and it is an offence to engage in such activities without prior approval. The Central Bank issues standards, policies and guidance with which undertakings should comply, and has powers of enforcement.

Financial Services and Pensions Ombudsman

Complaints against insurance companies can be lodged with the FSPO, as outlined above.

Compulsory insurance scheme

Insurance intermediaries are required to hold professional indemnity insurance. This is set at €1.25 million per claim and €1.85 million aggregate cover per annum (pursuant to the Insurance Mediation Directive).

III YEAR IN REVIEW

There have been a number of High Court decisions on cases involving professional negligence in the past year.

The most notable development is the recent High Court decision in *Smith v. Cunningham*,¹¹ where Meenan J rejected the defendant's argument that a professional negligence claim against an engineer and a solicitor was statute barred, despite six years having passed since a defective certificate of compliance for planning permission was prepared. The case centred around a defective certificate of compliance, prepared by an engineer in 2006, which only became apparent to the plaintiff in 2008 when he entered into a contract to sell the property. Proceedings were issued in 2014, claiming professional negligence against the engineer and the solicitor. The claim for damages made by the plaintiff related exclusively to the financial loss that arose from the inability to complete the sale of the property. In his judgment, Meenan J relied on the Supreme Court case of *Brandley v. Deane*. Meenan J held that the date of damage was the date on which the contract of sale was rescinded, despite the fact that the defect (i.e., the defective certificate of compliance) occurred two years earlier. This decision could result in professional negligence claims being brought outside the prescribed six-year limitation period. The case is currently under appeal.

The High Court decision in *Power v. Creed*¹² involved an unsuccessful motion to strike out a professional negligence claim against a chartered engineer for delay/want of prosecution. The engineer claimed that prejudice had been caused to him by having allegations of professional negligence hanging over him for so many years and as a result of which he has to notify insurers of that fact on renewal. The defendant relied on *Farrell v. Arborlane*¹³ where Peart J considered that the claim against the architect should be struck out in particular due to the fact that there was evidence that the architect had encountered difficulties renewing his

11 [2018] IEHC 600.

12 [2018] IEHC 688.

13 [2015] IEHC 535.

professional indemnity insurance. However, in *Power v. Creed*, Baker J distinguished the case from *Farrell v. Arborlane* and considered that the engineer had not provided evidence that he had difficulty obtaining professional indemnity insurance.

In *Rossiter v. Donlon*, Barr J considered a plaintiff's claim that a defendant doctor acted negligently and in breach of the National Breast Cancer GP Referral Guidelines by not insisting more strongly that the patient undergo further examination when she heard the plaintiff's complaint. Having heard evidence from various experts, Barr J found that the doctor was not negligent in failing to push the issue of a breast examination once it had been declined by the plaintiff.

There have also been a number of interesting decisions of the English courts in the past year, in particular in relation to the extent to which, and to whom, professionals can be held liable for losses. For example, the decisions of the Court of Appeal in *Manchester Building Society v. Grant Thornton UK LLP*,¹⁴ and *Lloyds Bank Plc v. McBains Cooper Consulting*¹⁵ both applied the distinction between 'information cases' and 'advice cases' in professional negligence claims, confirmed by the earlier Supreme Court decision in *Hughes-Holland v. BPE Solicitors*.¹⁶ In both decisions it was held that the liability of a defendant for recoverable losses was limited to the loss for which it had accepted responsibility. In *Steel v. NRAM*,¹⁷ the Supreme Court considered whether a solicitor acting for a borrower owed a duty of care to a mortgage lender. The Supreme Court held that, on the facts of the case, the solicitor had not assumed responsibility to the lender and that it was neither reasonable nor foreseeable that the lender would rely on information received from the borrower's solicitor. These cases have not yet been considered by the Irish courts, and it remains to be seen whether they will be adopted.

i Legislation affecting the legal profession

The Legal Services Regulation Act 2015 will involve a significant change to the regulation of the legal profession, once fully commenced. It establishes the Legal Services Regulatory Authority (LSRA), which will be responsible for regulating the provision of legal services by barristers and solicitors. It also establishes a Legal Practitioners Disciplinary Tribunal, which will hear complaints against solicitors and barristers. The Act also provides for a mediator to assist in the complaints procedure and, failing this, a determination to be made by the LSRA. It introduces new practice structures and a new costs system. Currently, the only provisions that have been commenced relate to the establishment of the LSRA, a report by the LSRA on the operation of multidisciplinary practices, and public consultation on operation of legal partnerships and issues relating to barristers.

ii Legislation affecting banking and finance professionals

A new office of the FSPO was created by the Financial Services and Pensions Ombudsman Act 2017, which came into force on 1 January 2018. Notably, the Act also extends the limitation period for customers to bring a complaint against a financial services provider regarding long-term financial services to either six years from the date of the conduct giving rise to the complaint, or three years from the date on which the person making the complaint

14 [2018] PNL R 27.

15 [2018] PNL R 23.

16 [2017] 2 WLR 1029.

17 [2018] 1 W.L.R. 1190

first became aware or ought to have become aware of that act or conduct, or such longer period as may be permitted by the FSPO. The matter complained of must have occurred during or after 2002.

The FSPO may award compensation of €52,000 per annum where the subject of the complaint is an annuity, or €500,000 in respect of all other complaints. This is an increase from the previous maximum level of compensation, which was €250,000.

The Minimum Competency Framework comprises the Minimum Competency Code 2017 and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1) Minimum Competency) Regulations 2017. It sets out minimum professional standards for persons providing financial services. It also sets out base levels of qualification and experience for staff of financial services providers.

iii Legislation affecting medical practitioners

The Medical Practitioners Amendment Act 2017 Act introduced a mandatory requirement for doctors in private practice to hold professional indemnity insurance (with limited exceptions). Doctors in the public health service are covered under the state's clinical indemnity scheme.

The Civil Liability Amendment Act 2017 was enacted on 22 November 2017, and Parts 2 and 3 of the Act commenced on 1 October 2018. The Act introduces a legislative basis for the courts to make periodic payment orders in catastrophic injury cases. Periodic payment orders allow a plaintiff to have the compensation paid in a series of index-linked payments, over the course of the plaintiff's life, limiting the possibility of being undercompensated. New Rules of Court have been introduced in the Irish courts to facilitate the making of periodic payment orders. These new Superior Court Rules came into force in Ireland on 31 October 2018, and the first formal periodic payment order was granted in February 2019.

iv General Data Protection Regulation

The General Data Protection Regulation (GDPR) came into force on 25 May 2018, making data protection a priority issue for professionals. The GDPR will have wide-ranging implications for professionals, most notably for solicitors, banking, finance and insurance professionals, given the nature of the data they hold in relation to their clients. In essence, the GDPR strengthens existing protections and introduces new rights for individuals. The obligations that will be imposed on professionals include ensuring appropriate record-keeping and implementing adequate security standards, which will involve cost implications, as well as the possibility of regulatory recourse in the event of a breach.

The Data Protection Act 2018 was signed into law on 24 May 2018 and is intended to give further effect to the GDPR in Ireland and to transpose the accompanying directive into Irish law. The Act outlines additional details regarding the technical and organisational measures that should be implemented to comply with key obligations.

IV OUTLOOK AND FUTURE DEVELOPMENTS

i Cyberattacks

Cyberattacks have been on the rise and it is likely that there will continue to be an increased number of cyberattacks against professionals, particularly those who manage client funds or hold valuable data. Law firms hold a vast array of sensitive information on their servers, from intellectual property to medical records and bank details. This information is highly valuable and recently law firms have become popular targets for cyberattacks. The Garda National

Cybersecurity Bureau has advised the Law Society of Ireland that various cyberattacks on Irish law firms have been reported recently, with a surge in cyberattacks resulting from business emails being compromised, and has warned of an ongoing campaign against legal firms in Ireland. These attacks appear commonly to be phishing attacks; however, they can also take many other forms, such as using ransomware to lock firms out of their information and firms being targeted by cybercriminals seeking information on mergers to be used for inside trading. Under the GDPR, firms are obliged to report a cyber-breach within 72 hours, which will open the firms up to significant reputational damage, as well as the potential for negligence actions, and, if the firm is in breach of GDPR standards, it may be liable for fines of up to 4 per cent of annual global turnover or €20 million (whichever is greater).

ii Increased use of technology

Emerging technologies also present opportunities and challenges for professionals. Automation is increasingly a feature of professional life and various professions, including the legal profession, are investing in new technologies and automation.

The use of commercial drones is increasing in the construction industry, particularly among surveyors. The technology surrounding drones is rapidly developing and, to mirror the emerging technology in this area, legislative reform is proposed. The draft Small Unmanned Aircraft (Drones) Bill 2017 proposes to place an obligation on commercial drone operators to have insurance in place, and imposes criminal liability for certain drone offences. It prohibits the use of a drone for surveillance, capturing images, videos, etc. where there is a reasonable expectation of privacy, and without consent. There is currently no timeline for implementation.

In the insurance sector, in future there is likely to be litigation challenging the claims decisions made by automated claims-processing systems and regarding the interpretation of the specific GDPR articles that confer rights on individuals in relation to automated decision-making.

iii Limitation periods

Following the decision of the Supreme Court in *Brandley v. Deane & Anor*,¹⁸ there is potential for claims being successfully brought against construction professionals outside the traditional six-year limitation period on the basis that the damage in question manifested at a later date, and this may lead to an increase in claims by plaintiffs who previously believed their claims were statute-barred. It is unclear whether the decision in *Brandley v. Deane & Anor* will apply to non-property damage claims. The High Court case of *Smith v. Cunningham* appears to apply *Brandley v. Deane & Anor* to claims for financial loss, however, as noted above, this case is currently under appeal. An extension of the limitation period applicable to claims brought before the FSPO in respect of long-term financial services may also lead to an increase in claims previously thought to be statute-barred being brought against financial services providers.

18 At the time of writing, the approved judgment has not yet been published.

MEXICO

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I INTRODUCTION

Under Mexican law, professionals are obliged to act diligently in accordance with their expected skills. Individuals are bound by a general duty of care; however, Mexican law recognises, in statute and precedent, that professionals are held to a higher standard. Regardless of whether professional service obligations arise from a contract, professionals are liable if they fail to observe this higher standard of diligence.

The first part of this chapter sets out the general legal framework applicable to professional liability. To that end, it explains the different types of liability that individuals may face in the exercise of their profession, the procedures applicable when claims of professional liability are brought, and the direct and immediate damages and lost profits that the service receiver may recover for the professional's misconduct.

The second part of this chapter sets out examples of professions with particular regulations, authorities and sanctions; these laws generally relate to areas of social interest and public order.

Finally, the chapter outlines recent and future developments with respect to case law derived from the recent Mexican educational reform, the new regulation on corporate liability, the possible introduction of punitive damages in Mexico, the increasing attempts to make bar association affiliation mandatory, the effects of the 'new' corporate liability and the tendency towards orality in judicial proceeding.

i Legal framework

Article 5 of the Mexican Constitution provides for the right to perform any profession, industry, business or work. This right may only be revoked by a court decision or by government order when third parties' rights or society's rights are infringed, respectively. Thus, the right to perform a profession contains certain limits and restrictions.

According to the Regulatory Law of Article 5 of the Mexican Constitution concerning the Exercise of Professions in the Federal District (the Regulatory Law), which applies to professionals in Mexico City and on a federal level, a professional service includes the

¹ Omar Guerrero Rodríguez and Jorge Francisco Valdés King are partners and Eduardo Lobatón Guzmán is an associate at Hogan Lovells. The authors also thank Elisa Legorreta Pastor for her collaboration in the first edition of this article.

rendering of any service specific to a particular profession, and includes the use of cards, announcements, plaques, badges or other means² to indicate the characteristic features of a particular profession.

To exercise a profession, the individual is required to: (1) be in full exercise of his or her civil rights, (2) hold a duly registered degree and (3) hold a permit to exercise the profession issued by the General Directorate of Professions.³ A professional is obliged to put all scientific knowledge and technical resources into practice at the service of their clients, as well as to perform the work that was agreed upon by the parties.⁴ Also, a professional is obliged to keep strict secrecy regarding the matters entrusted to them.⁵ Unlike in other countries, Mexican law does not provide for mandatory allegiance to a bar association.

Individuals may exercise their profession on their own or as employees. Professionals who exercise their profession as employees are subject to the Federal Labour Law.⁶ Governmental professional employees are also subject to other administrative laws.

In the exercise of their profession, individuals are subject to the applicable laws – whether general or specific to their professions (e.g., *lex artis*)⁷ – as well as to the contracts they conclude with the service receivers. Professionals should act diligently in accordance with their professions. Breaches of contract or of law expose them to different types of liability.

Civil liability

All 32 states of the Mexican Republic have their own civil code, most of which mirror the Civil Code of Mexico City.⁸ Also, all 32 states have their own code of civil procedure.⁹ The Federal Civil Code of Mexico (the Federal Civil Code) serves as gap filler for federal laws, but the regime it promulgates is almost identical to that of the Civil Code of Mexico City. For the purposes of this chapter, we will refer to the provisions of the Federal Civil Code, which are almost identical to the local civil codes.

Article 1910 of the Federal Civil Code establishes that anyone acting unlawfully or against good practices who causes damage to another shall repair the damage. This Article enhances the core premise of civil responsibility. Under this premise, civil liability arises

2 The Regulatory Law, Article 24.

3 id., Article 25.

4 id., Article 33.

5 id., Article 36.

6 id., Article 37.

7 *Lex artis* means the universally accepted rules for the exercise of a profession. It serves as an assessment criterion for evaluation of the level of diligence that can be demanded in the execution of a certain professional act.

8 On 29 January 2016, Mexico City began its transition towards a federal state. A political reform allowed the Mexican capital (formerly officially named the ‘Federal District’) to become the 32nd state of the Republic, which has been renamed as Ciudad de México. The new federal entity has managerial autonomy and its own Constitution, while continuing to be the country’s capital.

9 On 15 September 2017 the Mexican Constitution experienced several amendments. Among others, Article 73 of the Constitution has a new Section (XXX) to enable Congress to legislate in civil and family procedure. Currently, each Mexican state has its own procedural legislation for civil and family matters. Mexico seeks with this reform to have a single procedural law for civil and family matters applicable to the entire country, which is intended to minimise the formalisms in judicial proceedings and to eliminate the different judicial criteria when dealing with similar procedural institutions. The new procedural code has not been published yet.

whenever the following elements are met: (1) commission of an unlawful act; (2) direct and immediate damage; and (3) a causal relationship between the unlawful act and the damage caused.

Acts are unlawful when they violate a specific legal rule or good customs.¹⁰ Mexican law requires that damage must be the 'direct and immediate' consequence of the unlawful act.¹¹ Mexican case law has dealt with what should be understood by the terms 'direct and immediate'. The benchmark is that the damage will be the direct and immediate result of a cause when it is the 'effective cause'. The effective cause analysis states: had the unlawful act not occurred, the damage would not have occurred.¹²

Civil liability may arise from two sources: contractual liability and extra-contractual liability (known as 'tort' in other jurisdictions).

Contractual liability

Contractual liability derives from a breach of an agreement or contract. As a general rule, the parties to a contract may agree on the terms and obligations that they freely choose, as long as the subject matter is lawful. However, the law also establishes certain limitations to the freedom of contract taking into consideration the nature of the contract and the rights at stake.¹³

For example, with respect to professional services, the Federal Civil Code provides that the individual who exercises any profession without the proper licence will lose the right to charge remuneration for the professional services rendered.¹⁴ Also, when a professional can no longer render services, he or she should promptly notify the client and will still be liable for damage and loss of profits caused by the withdrawal of the services.¹⁵

A claim on breach of contract has two main requirements: (1) that the non-breaching party is in compliance with its obligations under the relevant contract to seek relief (i.e., 'clean hands'); and (2) that the breaching party has indeed breached the contract.

Extra-contractual liability

Extra-contractual liability under Mexican law may be considered as premised on the principle of *alterum non laedere*, which states that everyone has the duty not to inflict harm upon others.¹⁶

Therefore, extra-contractual liability or tort may arise independently of any contractual relationship between the parties. Extra-contractual liability may be (1) objective, which exists independently and the conduct of the agent was not guilty or negligent, and (2) subjective, which necessarily constitutes unlawful, negligent and damaging conduct.¹⁷

10 Federal Civil Code of Mexico, Article 1830.

11 *id.*, Article 2110.

12 Civil liability. Burden of proof of the damage suffered by a passenger on board a transportation vehicle. Thesis: I.4o.C.P C (10 a.).

13 The Mexican Bar Association has recommended a Model of Professional Services Contract of Lawyers, which is not mandatory.

14 Federal Civil Code of Mexico, Article 2608.

15 *id.*, Article 2614.

16 Contractual and extra-contractual liability. Their differences. Thesis: 1a. CXXXV/2014 (10.a.).

17 Civil liability. Concept and classification. Thesis: 1a. LII/2014 (10a.).

The degree of guilt or fault will be determined depending on the type of responsibility or duty of care that the agent has towards the victim. In Mexican law, there are several types of guilt. The degrees of guilt are not defined in statute but are referenced in precedent and doctrine.

Guilt *stricto sensu* exists whenever the damage would have been foreseeable and could have been avoided had the agent acted diligently.¹⁸ Wilful misconduct exists when the agent intentionally wants to damage the victim. Gross negligence constitutes extreme negligence, recklessness or incompetence, for not being able to foresee or understand what a normal person foresees or understands, omitting the most elemental care, diligence, etc.¹⁹ Ordinary negligence is the omission of diligence of an ordinary person in the conduct of his or her affairs; and slight negligence, is the omission of diligence of a person who is extremely diligent.²⁰

The professional should be diligent in accordance with his or her expected professional skills. For example, in a recent precedent, the Supreme Court found employees of a school liable for damage caused by bullying between students, since the teachers were expected to act diligently and in accordance with their profession, which includes actively preventing and detecting any acts of bullying.²¹ There was a subsequent decision by the Supreme Court that found that schools and their staff have the obligation to generate an adequate school environment and create instruments to protect the students against bullying.²²

Specifically, the Supreme Court ruled that the unlawful act was the consequence of two sources: (1) the breach of an obligation to act in accordance with a certain legal provision, and (2) the breach of a general duty of care expected of a professional.

Coexistence of contractual and extra-contractual liability

The Mexican Supreme Court rendered a decision whereby it recognised that a contractual and extra-contractual liability may coexist when dealing with medical malpractice. The Supreme Court reasoned that even if the patient has a social security contract or a contract for professional services with a physician, the doctor is still bound to act diligently in accordance with his or her profession. In this case, the Supreme Court found that even where the patient had given consent regarding the administration of anaesthesia, damage caused by the negligent administration of this medical component gave rise to an extra-contractual liability or tort independent of the contractual relationship between the parties.²³

In a different decision, the Supreme Court also established that, in a contractual relationship, the client can accept certain risks regarding the rendering of the services.

18 Asali Harfuch, Luis, *Las Eximentes de la Responsabilidad Civil Extracontractual*, Professional thesis, México, Distrito Federal, 2003, p. 13, citing: Mosset Iturraspe, Jorge, *op. cit.*, Vol. I, p. 138.

19 *id.*, p. 16.

20 *id.*

21 Bullying at school may generate damage and losses through actions or omissions. Thesis: 1a. CCCXIII/2015 (10a.) p. 1641.

22 Bullying at school. Constitutes major social relevance the fulfilment of diligence duties by school centres. Thesis: 1a. CCCLII/2015 (10a.) p. 952.

23 Damage originating from the negligent administration of anaesthesia generates a subjective civil responsibility. Jurisprudence: 1a/J.22/2011 (10A).

However, if the harmful event occurs because of the negligence or omission by the service provider, there will be extra-contractual liability, since that damage cannot be accepted in a services agreement.²⁴

Liability for lack of diligence in professional services

Apart from identifying whether a contractual or extra-contractual liability may arise within a professional service relationship, it is important to assess who is the responsible individual.

Article 2615 of the Federal Civil Code establishes that whoever renders professional services is only liable towards the persons that he or she is serving, for negligence, lack of skill or wilful misconduct, regardless of sanctions that may apply in the event of a crime.

This legal provision can be construed in different ways: the first is that a professional is not liable to third parties that are not clients; the second is that a professional is liable to clients only for negligence, lack of skill or wilful misconduct. There is no legal precedent that answers this question.

However, to obtain relief under a suit for damage and lost profits arising out of negligence, a claimant has to prove that the defendant had a duty of care, that the alleged negligent actions of the defendant breached the duty of care, and that the actions resulted in, as a direct and immediate consequence, the damage and lost profits that the plaintiff is seeking, otherwise a Mexican court would not find for the plaintiff. Plaintiffs will need to demonstrate the necessary connection between the alleged negligent action or omission and the direct and immediate damage and lost profits. The available types of damages and redress for lost profits are explained in Section I.iv.

Criminal liability

Title XII of the Federal Criminal Code of Mexico considers that certain conduct or acts constitute a crime within the arena of professional responsibility. Chapter I of Title XII provides that professionals, artists or technicians and their assistants will be responsible for crimes committed in the exercise of their profession, and without prejudice to liability contained in regulations applicable to the specific profession.²⁵ The individuals who commit such crimes are subject to, among other things: (1) one month to two years' suspension from exercising the profession, and (2) reparation of the damage so caused. This is applicable to physicians who without cause stop the treatment of an injured or sick person.

The directors, managers or administrators of any health centre may be subject to imprisonment (of two months up to two years) and fines for any of the following conduct: (1) preventing the departure of a patient, when he or she or family members request it, on account of debts of any kind; (2) unnecessarily retaining a newborn, on account of debts of any kind; or (3) delaying or denying for any reason the delivery of a corpse – except when an order from a competent authority is required. The same sanctions apply to managers, employees or dependants of a pharmacy who substitute medicine specifically prescribed with another medicine that causes damage or is evidently inappropriate for the condition for which the original medicine was prescribed.²⁶

24 Damage due to negligence. If it is caused, it cannot be deemed as accepted based on a services agreement. Thesis: 1a. CCXXXVI/2014 (10a.) p. 450.

25 Federal Criminal Code, Article 228.

26 *id.*, Article 230.

Chapter II provides that lawyers, representatives and litigators are subject to penalties, including two to six years' imprisonment, fines and disqualification or suspension from the exercise of their profession for two to six years if they engage in the following conduct:

- a* allege false facts or non-existent or repealed laws;
- b* use certain illegal dilatory tactics;
- c* base their action or defence on false or worthless documents or witnesses; or
- d* simulate a legal act or writ, alter evidence and present it at trial, to obtain a ruling, resolution or administrative act contrary to the law.²⁷

In addition to the above-mentioned sanctions, lawyers, representatives and litigators may be subject to three months' to three years' imprisonment for:

- a* sponsoring or assisting divers contenders or parties with opposing interests, in the same or a related business;
- b* abandoning the defence of a client or business without just cause; and
- c* accepting the position of defence counsel but merely requesting the cautionary freedom of his or her client without presenting further evidence.²⁸

Chapter VII of Title XIII of the Federal Criminal Code of Mexico, among other things, regulates conduct and applicable sanctions in connection with the exercise of a profession without the corresponding title or authorisation issued by the competent authorities. The applicable sanctions for this crime range from one to six months' imprisonment and a fine.

Moreover, the Regulatory Law also provides several kinds of conduct or acts that constitute a crime by professionals or individuals who present themselves as professionals. The Regulatory Law provides administrative sanctions for these crimes; however, while describing criminal conduct, this Law almost always refers to the applicable articles of the Federal Criminal Code of Mexico with reference to a specific type of conduct and the corresponding sanction.²⁹ However, criminal sanctions may also be provided for in legislation other than the criminal codes (see Section II for legislation applicable to specific professional activities).

Administrative liability

Administrative liability may also arise in certain cases. Some professions (e.g., the medical and finance professions) are regulated by their *lex artis*, which establishes specific obligations, competent authorities and sanctions. Specifically, all health industry professionals, technicians and auxiliaries who provide medical services in the public and social security sectors are subject to administrative liability.³⁰

In addition, individuals may exercise their profession on their own account or as employees. Professionals who exercise their profession as employees are subject to the Federal Labour Law. Public officers are also subject to other administrative laws.

27 id., Article 232.

28 id., Article 233.

29 The Regulatory Law, Articles 61–73.

30 María Teresa Ambrosio Morales, Luz María Reyna Carrillo Fabela and Bárbara Victoria González Mora. La Responsabilidad Del Médico como Servidor Público en México. Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. México: n/d. p. 500.

ii Limitation and prescription

Civil claims

As a general rule, and unless specified as an exceptional case, the right to enforce a judicial action is only extinguished upon the expiry of a 10 year-term from the date on which the right became effective.³¹

Notwithstanding this, a two-year statute of limitations applies to civil liability arising from unlawful acts that do not constitute a crime.³²

Both Article 1161-V and Article 1934 of the Federal Civil Code provide a two-year statute of limitations for claims arising from unlawful acts. However, pursuant to Article 1161-V, the statute of limitations starts running on the day that the act takes place, while according to Article 1934 the statute of limitations starts running on the day that the damage is caused. Therefore, these provisions are apparently contradictory.

While analysing Article 1934 of the Federal Civil Code, the Mexican Supreme Court issued a binding precedent stating that it is necessary to consider the moment at which the affected person becomes aware of the damage so caused for the statute of limitations to start running. Therefore, it seems that Article 1934 of the Federal Civil Code should apply with respect to when the statute of limitations starts to run.³³

In addition, the Supreme Court has also established (in non-binding precedent) that the two-year statute of limitations is only applicable to patrimonial damages. However, when the damage is caused to life or integrity, the applicable statute of limitations must be the general rule (i.e., 10 years).³⁴

Criminal claims

The Federal Criminal Code establishes specific rules for the statute of limitations of crimes. There are four main criteria for the determination of the statute of limitations in criminal actions:

- a* for crimes punishable only by a fine, the statute of limitations for a criminal action expires after one year;³⁵
- b* for crimes punishable by imprisonment, the statute of limitations is equal to the arithmetical average punishment term;³⁶
- c* for crimes punishable only by removal from post, suspension or disqualification from office, the statute of limitations is two years;³⁷ and

31 Federal Civil Code, Article 1159.

32 Federal Civil Code, Article 1161-V and Article 1934.

33 Causes of damage in terms of Chapter V of the first title of the Federal Civil Code and the Federal District Civil Code. Thesis: 1a. J. 113/2011 (9a).

34 Statute of limitations. Applicable terms in cases of extra-contractual civil liability derived from damage to life or integrity. Thesis: 1a. CXCVII/2018 (10a.) p. 373; Compensation for damage caused by medical negligence. When the life or integrity of persons is affected, the statute of limitations in the generic one provided in Article 1159 of the Civil Code for the Federal District, applicable for Mexico City. Thesis: 1a. CC/2018 (10a.) p. 400.

35 Federal Criminal Code, Article 104.

36 Federal Criminal Code, Article 105. The arithmetical average is the sum of the minimum imprisonment time set for a specific crime plus the maximum imprisonment time (both in years), divided by two. For example, imprisonment for serious fraud ranges from three to 12 years under the Federal Criminal Code. Therefore, the arithmetical average is 7.5 years.

37 Federal Criminal Code, Article 106.

- d* for crimes that can only be prosecuted following a complaint by the aggrieved party, the statute of limitations for a criminal action expires after one year.³⁸

These terms may vary according to the applicable *lex artis*.

iii Dispute fora and resolution

As noted in the previous sections, professional liability is mainly governed by civil law and, to a lesser extent, by provision in criminal law for specific crimes.

In this context, professional liability claims arising from contractual or extra-contractual liability should be brought before a civil court in the state in which the offence was committed. Likewise, the commission of a crime must be heard by a criminal court.

Nonetheless, Mexican case law dealing with professional liability is largely based on medical malpractice.

In light of the growing number of lawsuits against doctors, the Mexican government decided, in June 1996, to create, by a presidential decree, an independent national institution attached to the Ministry of Health to resolve conflicts between doctors and patients using alternative dispute resolution methods with the intervention of medical experts – the National Medical Arbitration Commission (CONAMED). As a result, the majority of professional liability claims alleging medical malpractice are brought before CONAMED.

CONAMED deals only with acts or omissions derived from the rendering of health services and medical malpractice. It does not have the authority to decide matters involving the commission of crimes, matters that are already being litigated in civil courts, labour matters, or matters in which the only relief sought is the penalisation of the medical professional.³⁹

Professional liability claims brought before CONAMED are decided through arbitration, in accordance with the CONAMED Rules of Procedure for the Attention of Medical Complaints. As the process takes the form of an arbitration proceeding, an arbitral agreement is required for a complaint to be resolved by CONAMED.

The proceeding before CONAMED begins with a conciliatory stage. If the parties do not reach an agreement, CONAMED presents a settlement proposal. If a settlement is not possible, CONAMED, or another person appointed as arbitrator, decides the arbitration through an arbitral award,⁴⁰ which, despite not being a judicial resolution, has the authority of *res judicata*.⁴¹

All proceedings (arbitral proceedings or proceedings of a different nature) are free of charge.⁴²

There are also some recent precedents regarding the burden of proof on medical negligence cases. In 2016, a circuit court ruled that, since the state is bound to protect the human right to health, it is the burden of the Mexican Social Security Institute to prove

38 Federal Criminal Code, Article 107.

39 CONAMED Rules of Procedure for the Attention of Medical Complaints, Article 50.

40 Carlos Tena Tamayo and Gabriel Manuell Lee (eds.). *Modelo Mexicano de Arbitraje Médico*. Comisión Nacional de Arbitraje Médico. México: 2003, pp. 105–112.

41 The parties should reach an agreement; otherwise, the right to bring their cases before a civil court still stands.

42 CONAMED Rules of Procedure for the Attention of Medical Complaints, Article 6.

that its medical staff provided the patient with the adequate treatment.⁴³ There is a similar precedent for all medical professionals by the Mexican Supreme Court that states that there is a reversal of the burden of proof where the medical professional must prove their diligent action.⁴⁴

iv Remedies and loss

Under the Federal Civil Code, the governing principle in damages cases consists in the restoration of the damaged item to its previous condition. If restoration is impossible, the responsible party must then pay for the corresponding damage and losses.⁴⁵

‘Damage’ is the loss or lessening of someone’s patrimony as a result of a failure to comply with an obligation,⁴⁶ and ‘loss’ is the preclusion from obtaining lawful gains that would have been received in the future if the unlawful act had not taken place.⁴⁷

Damage and losses must be the direct and immediate consequence of the failure to comply with the obligation, whether they have already occurred or will necessarily occur.⁴⁸

Civil liability may be entirely regulated by the contract between the parties, except for liability for damage caused by gross negligence. The parties may stipulate in the contract a set penalty (in the form of compensation) whenever certain contractual obligations are not met as set out in the contract and are, therefore, breached.⁴⁹ Therefore, Mexican law permits limitation of liability clauses. These clauses are normally valid, unless bad intent is found, which could render the clause null and void.

The Federal Civil Code stipulates that, in the presence of conventional penalties, the non-breaching party cannot seek other compensation for damage and losses, but can only obtain the compensation specified in the agreed clause.⁵⁰

Reparation for moral damage is also available for the victim. Moral damage is understood as the detrimental impact suffered by a person in her or his feelings, affections, appearance, honour, reputation, private life, physical integrity and physical aspect, or in the opinion that others have of him or her. When an unlawful act causes moral damage, the offender has the obligation to repair it by means of monetary compensation. This is independent of any other compensation that may arise as a result of material damage.⁵¹

In a moral damage claim, in determining the amount of the monetary compensation, the judge takes into account the nature of the injury, the degree of responsibility and the economic situation of the offender and the victim, as well as other circumstances of the case.

Although, under Mexican law, damages have traditionally been limited to compensatory damages, in a tort case decided by the Mexican Supreme Court in 2013 (the *Mayan Palace*

43 Access to health. It is the state’s duty to protect this human right and, thus, the Mexican Social Security Institute has the burden to prove, in the contentious administrative trial in which it is a defendant for negligent medical attention, that the medical staff treated the patient adequately in accordance with his or her condition. Thesis: XXI.2o.PA.18 A (10a.) p. 2725.

44 Extra-contractual civil liability in medical-health matters. Distribution of the burden of proof. Thesis: 1a. CCXXVII/2016 (10a.) p. 514

45 Federal Civil Code of Mexico, Article 1915.

46 id., Article 2108.

47 id., Article 2109.

48 id., Article 2110.

49 id., Article 2106.

50 id., Article 1840.

51 id., Article 1916.

case) moral damages were awarded to compensate a victim for the ‘damage so suffered’. The Supreme Court noted that moral damage redress must be fair and sufficient to compensate the victim. Likewise, the judgment provided that damage redress should be sufficient to be ‘dissuasive’, to prevent further damage. This ruling has been construed by some practitioners as an implicit recognition of Mexican courts’ ability to award ‘punitive’ damages when necessary.

Under a binding judicial precedent, issued on April 2017 by the First Chamber of the Mexican Supreme Court, limiting liability by fixing a monetary cap implies unfair compensation of damage. Thus, judges should quantify damages fairly, on a case-by-case basis.⁵²

In short, these kinds of punitive damages (more adequately moral damages) will probably start being awarded in contractual liability cases by Mexican courts.

II SPECIFIC PROFESSIONS

i Lawyers

In Mexico, lawyers are not obliged to belong to a professional bar, nor is there a binding code of ethics or conduct applicable to the legal profession. There are three main private bar associations in Mexico: the Illustrious and National Lawyers Bar Association of Mexico; the Mexican Lawyers Bar Association; and the National Association of Company Lawyers. All these associations try to standardise legal practice and have specific codes of ethics. While many legal professionals adhere to these bar association codes, affiliation to a bar association is not mandatory.

Regardless, there have been many attempts in recent years to make affiliation to a bar association mandatory for Mexican lawyers. For example, in 2004, the ex-president Vicente Fox filed an initiative before the Senate requesting a certification mechanism for defence attorneys in criminal proceedings.⁵³ The National Development Plan of 2007–2012 had as one of its objectives, to ‘promote a culture of legality’.⁵⁴ A possible standard by which to measure the achievement of this goal was mandatory affiliation to a bar association. Later, in 2010, there was a proposal to amend the Constitution, establishing that there should be a mandatory affiliation to a bar in all professions directly linked to life, health, security, freedom and patrimony of people.⁵⁵

In 2016, the Federal Economic Competition Commission (COFECE) issued a non-binding opinion suggesting ‘disregarding the mandatory affiliation as one of the mechanisms to regulate the exercise of a profession, for the effects that this particular mechanism could generate on the process of competition and free access’.

At present, there is no mandatory professional ethics code for lawyers, and any breach of the existing codes of ethics is hardly punishable because of their voluntary nature.

52 Fundamental right to complete reparation or just indemnification. Its concept and scope. Thesis: 1a./J. 31/2017 (10a).

53 La Colegiación Obligatoria de Abogados en México. Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. México: n/d, p. 93.

54 National Development Plan 2007–2012.

55 *ibid.*, p. 94.

ii Medical practitioners

The medical industry is perhaps the most regulated one in terms of professional liability in Mexico. In cases where a medical professional causes harm to a patient, the medical professional is exposed to administrative, civil and criminal liability.

Administrative liability may arise regardless of whether damage was caused or not. This type of responsibility arises from violations of the General Law of Health and particularly from violations of the regulatory law of the General Law of Health, which governs the rights and obligations of the users of medical services and establishes provisions in connection with consulting services, hospitals, maternal and childcare, family planning, mental health, rehabilitation and auxiliary diagnostic and treatment services, in private, public and social fields.

Health authorities are responsible for sanctioning violations of the above-mentioned provisions. Administrative sanctions may extend to an admonition with warning; a penalty fee; temporary or definitive closure; and arrest for up to 36 hours.

Health professionals in the public sector are subject to the duties of legality, honesty, loyalty, impartiality and efficiency that govern public service, and they may be also subject to sanctions established in the Federal Law of Administrative Responsibility.

Litigation arising from civil liability in medical practice may be resolved by a judicial process before a civil judge or through alternative dispute resolution proceedings before CONAMED.⁵⁶ In the case of a civil court proceeding, as well as civil liability for malpractice, the aggrieved party can also claim moral harm.

There are also some precedents that regulate the allocation of civil liability when there is a group of medics on a case. These precedents provide that when there are several doctors that treat a patient, without forming a team, they are all jointly liable for the damage caused. This has certain exceptions, for example, when there is a specialist (e.g., an anaesthetist), he or she can incur direct liability.⁵⁷ This is also the case for the team leader that is aided by medical assistants.⁵⁸

Finally, the actions of medical professionals can also give rise to criminal liability for crimes of professional responsibility. Criminal liability is personal, thus the medical professional may face imprisonment. Should the medical professional have malpractice insurance, it will only serve to indemnify for the harm caused.⁵⁹

iii Banking and finance professionals

Both securities brokers and investment advisers, and individuals holding managerial positions in financial institutions, are subject to administrative, criminal and civil liability for professional malpractice.

In connection with administrative liabilities, the National Banking and Securities Commission (CNBV) is authorised to remove members of a board, directors, managers, securities brokers and investment advisers from their positions and suspend them from

56 The CONAMED procedure is described in Section I.iii.

57 Civil liability for medical negligence. Its application regarding medical practitioners with scientific autonomy. Thesis I.4o.C.59 C(10a.) p. 1543.

58 Civil liability for medical negligence. Its application regarding the members of a medical team. Thesis: I.4o.C.58 C (10a.) p. 2261.

59 María del Carmen Montoya Pérez. Responsabilidad Civil Médica. Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. México: n/d, p. 215.

occupying a position within a financial entity or a publicly traded company for a term of up to five years; these measures can be taken in addition to economic sanctions provided under the Securities Exchange Act (LMV) and the Credit Institutions Law.

The LMV provides that securities brokers will be accountable for direct damage caused if they breach broker–client confidentiality. Furthermore, pursuant to the LMV, investment advisers and securities brokers must be certified by a self-regulatory organisation, prior to rendering their services. Self-regulatory organisations are in charge of issuing conduct manuals and implementing conduct standards among their members to strengthen the ethical conduct of their members and related persons. These self-regulatory organisations are also empowered to impose sanctions provided under their internal rules. Certification of banking professionals (who are subject to ethics codes of the banking self-regulatory organisation) may also be required if so determined by the CNBV.

Furthermore, managerial positions within financial entities entail higher levels of responsibility and accountability, such as being considered jointly liable with the financial entity in certain circumstances (e.g., failure to communicate to the auditing committee irregularities of which they were aware). Professional liability insurance is not mandatory for banking and finance professionals, but directors' and officers' insurance and professional liability insurance is permitted, and it is common practice to take out such insurance.

iv Computer and information technology professionals

In Mexican law, there is no specific regulation of professional liability of computer and information technology professionals. However, certain norms may apply specifically to information technology professionals.

For example, Article 67 of the Federal Personal Data Protection Law sets out a criminal penalty for a breach of database security by individuals authorised to work with personal data.

Also, regarding information leaks, the Federal Criminal Code provides that professionals or technicians who leak an industrial secret are subject to a criminal penalty: imprisonment from one to five years and suspension from the exercise of their profession.⁶⁰ Also, individuals who leak, disclose or misuse information or images obtained through an unlawful interception of private communications are subject to imprisonment of between six and 12 years.⁶¹

The Federal Criminal Code contains a chapter titled 'Unlawful access to computing systems', which refers to conduct and applicable sanctions for the unauthorised modification, destruction, loss, accessing, collection, copy or use of individuals' or state information contained in computing equipment and protected by security mechanisms.⁶²

Finally, Articles 119 to 122 of the Fintech Law, which recently came into force in Mexico, provides criminal penalties for those individuals who wrongfully use, obtain, transfer or divert resources, e-payment funds or virtual assets owned by clients of financial technology institutions.

v Construction professionals

Construction professionals must observe a substantial duty of care. They are liable for many obligations, established by law, in respect of the owner of a construction.

60 Federal Criminal Code, Article 211.

61 *id.*, Article 211 *bis*.

62 *id.*, Articles 211 *bis* 1, *bis* 2, *bis* 3, *bis* 4 and *bis* 5.

Articles 2617 and 2634 of the Federal Civil Code provide that construction professionals are liable to the owner during and after the construction. The constructor has responsibility for any defect caused by irregularities in the construction process, low quality of the materials used or of the ground where the project is built. Moreover, the constructor is liable for the actions or omissions of the personnel under its authority when these cause defects in the construction.⁶³ Finally, the constructor is answerable to the owner and has responsibility for any defects in the construction for six months after completion.⁶⁴

Construction professionals will be criminally liable if the construction licence is breached during construction and a prison sentence of four to six years can be imposed in such cases.⁶⁵

vi Accountants and auditors

A distinctive mark of the accounting profession is acceptance of the responsibility to serve the public interest; therefore, a public accountant is responsible not only for satisfying the needs of a specific client or of the entity that he or she works for.

The public accountant is bound to disassociate himself or herself from reports, relations, communications or other information that he or she believes causes confusion or mistakes through the omission or concealment of facts, data or circumstances.⁶⁶

The diligence required of public accountants encompasses the responsibility to act according to the requisites of a particular task, carefully, thoroughly and in a timely fashion.⁶⁷

Regarding tax reports, Articles 52 and 52-A of the Federal Tax Code (the Tax Code) provide that tax authorities are empowered to request any information and documentation regarding expert opinions prepared by certified public accountants (e.g., external auditors).

The public accountant (i.e., external auditor) who prepares an audit report may be required by tax authorities to:

- a* provide any information that the Tax Code, its regulations, the Omnibus Tax Ruling and the Mexican Financial Reporting Standards require to be included in financial statements;
- b* provide the working papers prepared in connection with the audit related to the report (the working papers are understood to be the property of the public accountant); and
- c* provide any information considered relevant to ensure that the taxpayer's tax obligations have been fulfilled.

A registered public accountant who fails to comply with the provisions of the Tax Code or its regulations will be subject to a warning or suspension of registration for up to three years.

In cases of repeat offences or if the accountant commits a tax offence, or fails, after receiving a request from the authorities, to file the working papers prepared in connection with an audit carried out on a taxpayer's financial statements for tax purposes, the accountant's registration shall be definitively cancelled.

63 Federal Code, Article 2633.

64 *id.*, Article 2149.

65 Mexico City Criminal Code, Article 329 *bis*.

66 Ethical Code of the Mexican Institute of Public Accountants, Article 110.2.

67 *id.*, Article 130.

In such cases, written notice shall immediately be given to the professional association and, as applicable, to the confederation of professional associations to which the public accountant belongs.

In addition to the previous penalties, if the tax authorities consider that the expert opinion rendered by a registered accountant contributes to, totally or partially, the omission of payment of any contribution in violation of tax provisions, the accountant will be subject to a fine.

vii Insurance professionals

Since the enactment in 2015 of the Insurance and Bonding Companies Law (LISF), insurance professionals⁶⁸ have been subject to specific obligations in the performance of their duties.

Under the LISF, insurance and bonding entities are jointly liable for the acts of their directors, officers and employees in the performance of their duties, without prejudice to the administrative, criminal and civil liability that these persons may incur as individuals.

The National Insurance and Bonding Commission (CNSF) has the authority to impose several sanctions on insurance professionals at all levels.

The CNSF may remove or suspend (for up to five years) any officers or auditors⁶⁹ from their appointments if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations.

In addition, the CNSF may ban directors, chief executive officers, statutory auditors, managers, fiduciary delegates and officers from performing any other role within the Mexican financial system – for up to five years – without prejudice to the penalties set out in the LISF and other applicable laws.

The LISF also regulates insurance and bonding agents. Agents may be individuals or companies authorised by the CNSF to intermediate insurance and bonds. The LISF, however, does not distinguish between agents and brokers, as many other jurisdictions do.

The authorisation of agents, as individuals, is valid for three years and may be renewed for an equal term. The authorisation of agents as companies may be for an indefinite term.

The CNSF may suspend or revoke agents' authorisation, without prejudice to the warnings and fines that may be imposed on them; and suspend or remove their directors, chief executive officers, statutory auditors, managers, legal representatives and officers if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations.

Pursuant to the Rules for Insurance and Bonding Agents and the Sole Provisions on Insurance and Bonding, agents must take out an errors-and-omissions insurance policy and must submit it to the CNSF.

Furthermore, reinsurance brokers are companies duly authorised by the CNSF to intermediate reinsurance. This authorisation may be for an indefinite term. Reinsurance brokers operate through reinsurance agents, who also need to be previously authorised by the CNSF. This authorisation is valid for five years and may be renewed for an equal term.

68 As a consequence of the LISF implementation, (1) insurance and bonding entities, (2) insurance and bonding agents, (3) reinsurance brokers, (4) insurance adjusters, (5) external auditors and (6) independent actuaries have had to strengthen their internal control processes for the performance of their duties.

69 This includes directors, chief executive officers, statutory auditors, managers, fiduciary delegates, officers, external auditors that evaluate the financial statements and the independent actuaries that evaluate the adequacy of technical reserves.

The CNSF may suspend (for up to two years) or revoke the reinsurance brokers' authorisation, without prejudice to the warnings and fines that may also be imposed on them; and suspend, remove or remove from post their directors and officers if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations, without prejudice to the economic sanctions that may also be imposed on them pursuant to the LISF and other applicable laws.

Moreover, insurance adjusters may be individuals or companies duly registered with the CNSF and appointed by an insurance company. The insurance adjusters evaluate the reasons for a claim or loss and calculate the resultant compensation.

The duties of the insurance adjusters must comply with the LISF, its regulations and the internal manuals that include the policies and procedures applied by the insurance company.

Insurance companies are jointly liable for the acts of their insurance adjusters.

The CNSF may cancel – or suspend, for up to two years – the insurance adjusters' registration (without prejudice to the warnings and fines that may also be imposed on them) if they fail to comply with the requirements set out in the LISF or if they commit a violation of the LISF and its regulations (also without prejudice to the economic sanctions that may be imposed on them pursuant to the LISF and other applicable laws).

The LISF provides that both external auditors that evaluate financial statements and independent actuaries that evaluate the adequacy of technical reserves shall be duly registered with the CNSF and appointed by the board of directors of the insurance or bonding company.

The CNSF sets the requirements for external auditors and independent actuaries, along with the measures necessary to guarantee an adequate alternation of these professionals in the insurance and bonding companies, and it indicates the information to be presented in the reports of these professionals.

Pursuant to the LISF, external auditors and independent actuaries must keep at least five years' records.

The CNSF may suspend or cancel the external auditors' and the independent actuaries' registration (without prejudice to the warnings and fines that may also be imposed on them) if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations (also without prejudice to the economic sanctions that may be imposed on them pursuant to the LISF and other applicable laws).

External auditors and independent actuaries incur liability for damages if their report is made with malice, without considering the information provided by the insurance or bonding company and without observing the applicable rules, procedures and methods in accordance with their profession.

III YEAR IN REVIEW

There have been two principal notable developments in the past few years. First, the 2012–2013 educational reform in Mexico created the General Law of the Professional Service of Professors, the purpose of which was to raise educational standards. To comply with the standard introduced by that law, teachers were bound to take an exam to measure their professional ability. Many teachers refused to take the exam and were removed from their jobs.

As a result of this situation, unemployed teachers filed *amparo* claims (constitutional challenges) requesting to be reinstated in their jobs by means of an interim measure. In a related case, the First Chamber of the Supreme Court ruled that the interim measure could

not be applied to address this issue, since education is a matter of public policy and social interest.⁷⁰ This decision may have ramifications for a number of professions that deal with matters related to public policy and social interest.

The 2012–2013 educational reform was recently abrogated. On 15 May 2019, a new constitutional reform was published concerning educational matters. Among other things, the new educational reform changed the system for the evaluation of teachers. Nevertheless, even with the previous reform abrogated, the precedents of the Supreme Court will still be relevant for professions that deal with public policy and social interest matters.

The second development deals with corporate liability. In 2015 and 2016, there was a significant anti-corruption reform in Mexico. Where previously the fight against corruption was mainly focused on public servants and their possible punishments, the reform introduced a focus on the punishment of corruption by private individuals.

The reform included two main features: circumstances in which the private individual is liable for corruption (which may include negligence, among other things), and also tools for companies and individuals to obviate this liability. Article 25 of the General Law of Administrative Responsibilities provides for ‘integrity policies’ that may reduce the liability of corporations, and these policies include:

- a* an organisational manual;
- b* a public code of conduct;
- c* adequate and efficient control mechanisms;
- d* adequate reporting systems;
- e* adequate training procedures;
- f* procedures for ‘secure’ recruitment (e.g., background checks); and
- g* transparency and publicity mechanisms.

Some proceedings for corporate liability have been introduced as part of this reform, and the adequate implementation of the above-mentioned integrity policies will play an important role.

IV OUTLOOK AND FUTURE DEVELOPMENTS

There are four particular matters that may affect professional liability and conduct in the future: the possibility of punitive damages in Mexico, the increasing attempts to introduce mandatory bar affiliation, the effects of the ‘new’ corporate liability and the tendency to orality in court proceedings.

First, as mentioned in Section I.iv, Mexican law has traditionally been understood as only allowing for compensatory damages. However, there was a 2013 landmark decision that seems to allow punitive damages under the moral harm provision in the Federal Civil Code. This decision could shortly prompt other decisions with similar interpretations of moral harm, thus expanding the degree of exposure resulting from professional liability. This new level of exposure will certainly be followed by the need for, and obligation to have, professional liability insurance.

70 Professional teaching service. It is inadmissible to grant an interim relief in an *amparo* proceeding filed in respect of acts issued by an authority in an administrative proceeding that have the effect of separating a teacher from a group or a teacher from his or her position; or in respect of the application of a penalty for not adhering to the process of evaluation provided in the applicable law. Thesis: PC.XXXLJ/11A (10a.).

Second, the attempts to introduce mandatory bar association affiliation have not stopped. There are continual attempts by the existing bar associations and by several practitioners to standardised practice through the introduction of compulsory affiliation to a bar association. There are many professionals who oppose such a move, but should these attempts be successful, the regulation of the legal profession (and even other professions) will undergo an important shift.

Third, there are no relevant cases yet on corporate liability, whether administrative or criminal. Nevertheless, these precedents could be set in the near future, following the changes introduced by the anti-corruption reform.

Lastly, following recent reforms to criminal procedural law and the Code of Commerce (regarding commercial cases), a tendency for orality has started to become prevalent within court procedures, as opposed to the written processes traditionally predominant in Mexico's legal system; and although professional services are a civil contract by nature, it is highly possible that this tendency towards orality will start to permeate civil cases too.

NORWAY

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I INTRODUCTION

i Legal framework

Professional liability is not a separate basis for liability, but rather a more stringent application of the law in certain situations, that may give rise to stricter liability for negligence.² It relates to the practice of a profession, which often has particular industry-specific norms or standards.³ Industry practice is just one of several reference points for determining what constitutes ‘good practice’ in an area.⁴

The objective expectations of the professional in question is central to the assessment of liability. Whether the neglect is related to a central obligation, what damage it may cause and alternative actions available are also relevant.⁵ Not every deviation from proper behaviour will expose a professional to liability,⁶ however, limited experience is no excuse.⁷

The standard expected is relative to the injured party. In commercial relations, strict requirements are generally imposed on both parties. It is not the mandate of tort law to safeguard against loss for a careless party.⁸

One requirement for liability is that an alternative, cautious, action would have prevented the loss. The offender bears the burden of proof to substantiate that the damage would also have occurred in the hypothetical course of events.

Liability may be limited by disclaimers or reservations, but a disclaimer may be subject to adjustment if deemed unreasonable and a reservation will not provide a blanket protection to a practitioner if he nevertheless engages in the assignment.⁹ The professional carries the risk of any uncertainty about the scope of the assignment.¹⁰

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2 Truyen, Filip, ‘Aksjeanalyse og informasjonsansvar’, *Tidsskrift for Rettsvitenskap* 2007 pp. 101–102.

3 Breach of such rules may be the basis for disciplinary action; see Section 1.1 of the Regulations of 20 December 1996 No. 1161 for advocates.

4 Conduct in accordance with industry practice was not enough to release the insurer from liability in the Supreme Court’s case HR-2006-537-a, paragraph (40).

5 LB-2017-95730, see Rt. 2014-422 paragraph 31 and LB-2017-50988.

6 Rt-1995-1350, on p. 1356. See also *Ivaran* Rt-2003-696 paragraph 43.

7 Rt-1994-1430.

8 Hagstrøm and Stenvik, ‘Erstatningsrett’ (2015) p. 472.

9 As an example, the reservation made by the defendant lawyers in LB-2018-27239 did not exempt them from liability.

10 The Bar Association’s comments to Section 3.1.1 of the Regulations for Advocates.

Common lines of defence are that the loss was not caused by the negligent action or was not reasonably foreseeable, that the injured party has contributed to the damage, that the loss calculation is erroneous or that limitation periods have expired.¹¹

There is nothing preventing third parties from claiming compensation, but where there is a contractual relationship, the professional's primary obligation will be towards his or her client.¹² A professional may, however, be liable for misleading information provided to third parties.¹³

ii Limitation and prescription

The limitation period for monetary claims is three years. For claims arising from breach of contract, the limitation period runs from the date when the breach occurred. For other claims for damages, it runs from the date on which the injured party obtained or should have obtained knowledge of the damage and the person responsible.

A supplementary period of one year applies if the claimant lacked knowledge of the claim or the debtor.¹⁴

iii Dispute fora and resolution

Unless the parties have agreed to arbitration, compensation claims may be brought before the ordinary public courts,¹⁵ who offer mediation, judicial mediation and regular proceedings.¹⁶

Certain disputes may also be tried by low-cost advisory tribunals, which regularly consider whether applicable standards have been adhered to without taking a position on compensation.¹⁷

11 The ordinary conditions to be awarded damages will apply regardless of the label of the basis for liability: the claimant must have suffered a financial loss that was predictable to the defendant and caused by his or her negligent actions or omissions.

12 For instance, in Rt-1995-821, a lawyer was acquitted of a compensation claim based on the argument that he should have neglected the duty of care in relation to a party that was not his client.

13 The conditions for such liability are that (1) the information must have been misleading due to negligence on the part of the person who provided the information in a professional context, (2) the injured party must have had a reasonable and justified reason to trust and adhere to the information and (3) it must have been intended for the injured party or a limited group to which he or she belonged, see *Grue Savings Bank* HR-2016-2344-A paragraph 40.

14 Sections 1,2 3, 9 and 10 of Act No. 18 of 18 May 1979 relating to the limitation period for claims.

15 See the Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes (the Dispute Act). The courts of Norway have general jurisdiction and the number of specialist courts is negligible. Some cases must be heard by the conciliation board in the first instance, but the board shall, inter alia, not hear cases against public authorities or institutions, or certain cases decided by a tribunal.

16 For example, Oslo District Court assisted in a successful judicial mediation for several weeks in the spring of 2015. The case concerned an auditing client's claim for compensation in the billions against one of the 'Big Four'. The mediation thus saved both parties from months or probably years tied up in the court system, with all the procedural uncertainty and use of resources such extensive proceedings usually entail.

17 If a tribunal finds that a professional has breached applicable legislation or standards and the case is not settled, this may encourage the injured party to file a claim for damages before the courts.

iv Remedies and loss

The injured party shall have his or her financial loss covered, neither more nor less.¹⁸

Especially when the claim is significant, the dispute will typically extend to the loss calculation.

If the claimant has failed to reduce the risk of or limit the damage, the compensation may be reduced or completely discounted.

Liability may be alleviated if it is unreasonably burdensome, or if the injured party should bear all or part of it, but this is rare.¹⁹

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers are bound by a Code of Conduct, which is enforced through the disciplinary system.²⁰ Most decisions can be referred to the courts for revision.²¹

Lawyers must provide security to cover any liability that may be incurred while practising under their own name,²² and must be insured against liability claims against their professional practice.²³ The principal is responsible for his or her associates' acts or omissions. Positive case law indicates that parties other than clients may also have legal protection against damage, depending on the circumstances.²⁴

There are five typical errors²⁵ that may lead to liability:

- a exceeding time limits that lead to loss for the client;²⁶

18 Section 4-1 of the Act of 13 June 1969 No. 2 relating to compensation in certain circumstances (the Damages Act). There is no room for punitive damages, however, in some cases a more symbolic compensation for non-financial loss may be awarded, see Chapter 3 of the Damages Act.

19 See Section 5-1 and 5-2 of the Damages Act and NOU 2017:15 p. 185. The risk of recourse claims from the professional's insurance company is not decisive.

20 The Bar Association's Disciplinary Council deals with complaints about fees and breaches of the Code of Conduct, and its decisions can be appealed to the publicly appointed Disciplinary Board, see <https://www.advokatforeningen.no/om/om-medlemskapet/english/the-norwegian-bar-association/>. The Lawyer Licensing Board and the Supervisory Council for Legal Practice also exercise supervisory and disciplinary authority vis-à-vis lawyers, see Sections 225 to 227 of the Act relating to the Courts of Justice of 13 August 1915 No. 5 (Court of Justice Act).

21 NOU 2015:3 p. 311. The discretionary assessment of whether a lawyer has violated the code cannot, however, be assessed by the courts, see NOU 2015:3 p. 317.

22 The security may not be used to cover liability for which the lawyer has provided other statutory security, see Section 222 of the Courts of Justice Act, see Section 2 of the Regulations for Advocates. The collateral must be higher for lawyers who have authorised associates or who are engaged in debt collection activities or real estate brokerage, see Section 2-7 of the Act of 29 June 2007 on estate agency, see Section 2-2 of Regulation No. 1318 of 23 November 2008 on Real Estate Broking.

23 Section 3.6 of the Code of Conduct in Chapter 12 of the Regulations for Advocates.

24 It has been argued that the relationship between the plaintiff and the client must be examined, i.e., whether or not the third party has similar interests with the client, see Husabø, 'Advokatrolleforventninger - med særlig fokus på skatterådgiving', FEST-2002-nn-115, on p. 125.

25 <https://www.advokatforeningen.no/radgivning/klientforholdet/profsjonsansvar/>.

26 Rt-1998-740.

- b* breach of formal requirements;²⁷
- c* negligent advice, especially if the lawyer has branded himself or herself as a specialist;²⁸
- d* real estate errors; and
- e* tax consultancy.²⁹

Although not assigned as a tax adviser, a lawyer may be expected to identify relatively simple and well-known tax law issues and refer the client to another lawyer with expertise in the area.³⁰

A tax adviser who has inflicted financial loss on the state may be subject to damage claims.³¹ So far, there are only a few such examples from case law.³² In Norway's largest criminal tax law case (the *Transocean* case), the state argued that *Transocean's* advisers were liable for damages of 1.8 billion kroner according to the general culpable standard.³³ As the defendants were acquitted from all charges, the court did not take a position on the civil claim, but the district court stated in another case that there must exist qualified negligence to hold the lawyer responsible for the loss.³⁴

ii Medical practitioners

To qualify for compensation from NPE,³⁵ to which all healthcare-providing entities have a contribution duty, an injury must result from a treatment 'failure' and have caused financial loss.³⁶

27 Rt-1989-1318. It is set out in Section 3.1.4 of the Code of Conduct that a lawyer should not undertake a mission when he or she knows or should know that he or she lacks the necessary skills if he or she is unable to consult with a qualified colleague. This does not apply, however, if the lawyer within a reasonable time ensures that he acquires the knowledge or competence that is necessary for a professionally responsible execution of the assignment.

28 Wågheim, 'Advokaters erstatningsansvar' (2009), p. 158.

29 The largest claims received by insurance companies are often linked to inadequate tax advice.

30 Husabø, on p. 121.

31 NOU 2009:4 'Measures against tax evasion', section 10.11.2.2.

32 For example, LE-1996-420 and LB-2013-191777.

33 See the Oslo District Court's judgment of 2 July 2014 (TOSLO-2011-104857-4 – TOSLO-2011-191007).

34 The lawyer was acquitted by the district court and settled with the state before the appeal case, see LB-2013-191777, according to which he paid 800,000 kroner. The amount was deducted from the state's financial loss when calculating its claim against the other defendants.

35 The Norwegian System of Patient Injury Compensation.

36 NPE determines the contribution amount according to the Regulations on the scope of the Patient Injury Act (FOR-2008-10-31-1166). Complaints on NPE's decision on compensation can be filed for the Patients' Injury Compensation Board within three weeks. A claim for compensation may be brought before the courts within six months of the Board's final decision, see Section 18 of the Patient Injury Act. After this deadline, the decision has the same effect as a legally enforceable judgment. For a graphic presentation of the claim's proceedings, see https://www.npe.no/globalassets/bildearkiv/grafisk/slik-er-saksbehandlingen/slik-er-saksbehandlingen-engelsk_320.jpg. Violations of requirements protecting patients from injuries may be brought before the County Commissioner, who may try if the requirements are broken and direct criticism at healthcare personnel. The contribution obligation follows from Sections 7 and 8 of the Patient Injury Act, see Section 20 of the Health Personnel Act. Anyone who intentionally fails to comply with the notification or grant obligations to NPE is punished by fines or imprisonment for up to three months. Recourse can only be claimed against a person who has failed to pay subsidies or intentionally caused the

It is not a condition that a particular individual must be proven to be at fault, however, the patient is entitled to the best possible treatment based on the existing conditions.³⁷

Whether or not inadequate information constitutes a basis for compensation must be considered with regard to the risk of disease in the near future.³⁸

Compensation may be awarded for non-financial loss if the injury is permanent and significant.³⁹ Breach of confidentiality may constitute an infringement of privacy that provides basis for redress in certain circumstances.⁴⁰

iii Banking and finance professionals

Financial entities are subject to statutory requirements for prudent operation and good business practice. Investment firms shall also safeguard the integrity of the market in the best possible manner.⁴¹ Debt collectors must furnish security for liability incurred in the conduct of their activities.⁴²

A customer may demand highly qualified and specialised advice. The service provider's organisation must provide the necessary information to fulfil relevant requirements, analyse relevant information based on the customer's needs and bring the results to the employees who carry out the assignment. The customer must be made aware of the risk associated with the investment decision.

Unless it has been expressed that the customer will not place significant reliance on a bank's advice, the requirement for diligence will apply regardless of the customer's level of knowledge.⁴³ Special circumstances, such as the needs expressed by the client, the parties' different positions and professionalism, and their insight into the relevant field, may, however, be relevant.⁴⁴ When selling risky and complex products to non-professional investors, the customer must understand the contents of the deal and not be furnished with misleading or erroneous information that affects the investment decision.⁴⁵

damage. The compensation will be calculated in accordance with the Damages Act and applicable case law. Financial loss below 10,000 kroner and redress under Section 3-5 of the Damages Act is, however, not compensated by NPE; see section 4 of the Patient Injury Act.

37 Section 2 of the Patient Injury Act.

38 <https://lovdata.no/pro/#document/HRENG/avgjorelse/hr-2017-687-a-eng>.

39 i.e., of a duration of at least 10 years and causing medical disability of at least 15 per cent.

40 See *NRK Rt-2006-799*, where redress under Section 3-6 of the Damages Act was awarded. The Supreme Court did, however, state that one should be cautious about imposing such liability on professional practitioners who make difficult decisions in pressured situations.

41 See Sections 1-3 and 13-5 of the Act of 10 April 2015 on financial institutions and financial groups and Section 10-9 of the Act of 29 June 2007 No. 75 on Securities Trading. Other relevant legislation includes the Act of 25 November 2011 on Securities Funds and the Act of 20 June 2014 on Alternative Investment Fund Management.

42 Section 29 of the Act of 13 May 1988 No. 26 on debt collection and other recovery of overdue pecuniary claims (Debt Collection Act), see Section 3-2 of the Regulation No. 562 of 14 July 1989 on Debt Collectors.

43 *Ideal Rt-2000-679*.

44 *Fearnely Rt. 2003-400* paragraph 39 and *Rt-2003-1524* paragraph 28.

45 *Roeggen Rt-2013-388* paragraph 125, with reference to *Fokus Bank Rt-2012-1926*.

The Financial Services Complaints Board deals with insurance, banking, financing, securities funds and debt collection disputes.⁴⁶

iv Computer and information technology professionals

These professionals essentially operate in an unregulated area, however, there are supervisory authorities for electronic trust services and data protection legislation.⁴⁷ It is customary to include insurance obligations in computer and technology contracts.⁴⁸

v Real property surveyors

The ethical guidelines for appraisers include requirements for liability insurance and assignment confirmations.⁴⁹ An appraiser may be held liable for negligence to the buyer of a property,⁵⁰ or to the seller's insurance company directly.⁵¹ Appraisers are expected to comply with decisions of the Complaints Board for Appraisers.⁵²

vi Construction professionals

Construction law is subject to freedom of contract within the boundaries of consumer legislation and statutory public law requirements.⁵³ It is common that standard contracts

46 <https://www.finkn.no/English>. When a complaint is being dealt with by the Board, neither party may bring the case before the courts, save from legal enforcements or interim court orders to secure a claim. An institution that does not intend to comply with the advisory decision must submit a report specifying the reasons for refusal.

47 There are some provisions on liability in special legislation, see the Act of 15 June 2018 No. 44 on Electronic Trust Services and the Act of 12 December 2018 No. 116 relating to the processing of personal data respectively. The Norwegian Communications Authority has supervisory authority for electronic trust services, see <https://www.nkom.no/aktuelt/nyheter/ny-lov-om-tillitstjenester->. The Norwegian Data Protection Authority supervises compliance with data protection legislation; see Section 22 of the Personal Data Act. The Authority's decisions may be appealed to the Privacy Appeals Board.

48 Pursuant to clause 15-2 of the Norwegian Government's Standard Terms and Conditions for IT Procurement, the contractor shall hold insurance policies that are sufficient to meet the claims from the customer as may arise on the basis of the risks and responsibilities assumed by the contractor pursuant to the agreement. See <https://www.anskaffelser.no/verktoy/contracts-and-agreements/utviklings-og-tilpasningsavtalen-ssa-t>.

49 The new ethical rules took effect from 1 January 2019 and are harmonized with current European standards, including the European Valuation Standards (2016), see <https://www.norsktakst.no/norsk/om-norsk-takst/regelverk/etiske-retningslinjer-og-regler-for-god-takseringsskikk/>, which address ethical issues associated with the appraiser's business and apply as collective regulations for all who certify themselves in the Norwegian Taxation Association, see, inter alia, Sections 2.8 and 6.1.

50 See Section 7.2.3.2 of Prop.44 L (2018–2019).

51 Rt-2008-1078. The liability may also be divided between the seller and the appraiser's insurance companies, see Rt-2015-556.

52 The Complaints Board for Appraisers deals with consumer complaints against association members in connection with appraisal assignments relating to housing and holiday homes. See www.takstklagenemnd.no/.

53 See the Act of 14 June 1985 No. 77 on Planning and Building and the Act of 27 June 2008 No. 71 relating to Planning and the Processing of Building Applications (the planning Part).

adapted to different project types require the contractor to provide liability insurance. For consumers, the contractor must guarantee fulfilment of new building contracts.⁵⁴ Specialist commissions may handle disputes.⁵⁵

A contractor's work must be performed in a professional manner that safeguards the principal's interests.⁵⁶ Industry norms, practices, safety rules and standard contracts may serve as guidance for the liability assessment.

If an enterprise approves a project that is not in accordance with granted permissions or applicable legislation, it may be held liable to governing authorities, the principal and third parties.⁵⁷

vii Accountants and auditors

Both the Auditors Act and the Accounting Act contribute to ensuring the quality of financial reporting. However, auditors and accountants perform different functions and have different roles.⁵⁸

Annual auditing gives certainty for those who make decisions in reliance upon financial statements. Strict standards must be met for an auditor to earn his or her title as 'a trusted person of the public'.⁵⁹ He or she must act with professional scepticism and ask critical questions.

Liability for negligence and security requirements are determined by statute.⁶⁰ The liability will be particularly strict for the auditor's core tasks;⁶¹ however, not every breach of 'good auditing practice' will constitute negligence.⁶²

54 Section 12 of the Act of 13 June 1997 No. 43 on contracts with consumers regarding the construction of a new building site.

55 The Housing Dispute Committee has been established by agreement between the Housing Producers' Association and the Consumer Council in accordance with Section 64, Paragraph 3, of the Building Act. For the Consumer Disputes Commission, see Section 1, Paragraph 1 b) of the Act of 17 February 2017 No. 7 relating to consumer complaints. See also <https://www.forbrukerklageutvalget.no/information-in-english/>. The Consumer Disputes Commission's decisions become binding and enforceable one month from the time the decision is served, unless one or both parties file a suit to the District Court within the deadline, see Section 12, see Section 7 of the Consumer Complaints Act, see Section 6-2, Paragraph 1 e) of the Dispute Act.

56 Section 7 of the Act of 13 June 1997 No. 43 on contracts with consumers regarding the construction of a new building site and Section 5 of the Act of 16 June 1989 No. 63 on craftsmen services, etc., for consumers.

57 See *Bori* Rt-2015-276 (dissenting judgment: 3-2), *Bori 2* HR-2017-1834-A, LB-2017-184360, and LF-2018-91155.

58 NOU 2017:15 p. 17.

59 See the role description of auditors in Section 1-2 of the Auditing Act (No. 2 of 15 January 1999).

60 Liability for negligence is set out in Section 8-1 of the Auditors Act. An audit firm shall be jointly and severally liable with an auditor who has performed an assignment on its behalf. Chapter 3 of the Regulations No. 712 of 25 June 1999 on auditing and auditors; see Section 3-7 No. 4 of the Auditors Act, set out security requirements.

61 For example, correct processing of questions about the calculation of value added tax lies within the auditor's primary responsibility, see HR-2008-1154-A paragraph 39. See also *Grue Savings Bank* HR-2016-2344-a paragraph 58.

62 *Ivaran* Rt-2003-696 paragraph 47; see Section 5-2 of the Auditors Act.

As is the case for lawyers, auditors may be held liable for the state's financial loss from tax evasion or losses suffered by other third parties.⁶³

Whereas the framework for an audit engagement is statutory, an accountant's assignment is determined by contract.⁶⁴ For cases concerning an auditor's negligent advice outside of his or her statutory duties, the assignment will, however, be central for the liability assessment.⁶⁵ In contrast to auditors, accountants cannot comment the accuracy of accounts or initiate reporting to third parties.⁶⁶

Auditors are required to document how an audit was conducted, and the result of it, to support and enable testing of their conclusions.⁶⁷ It may otherwise be difficult to substantiate that a proper audit has been conducted.

The Financial Supervisory Authority may control that audits are compliant with applicable legislation and standards.⁶⁸ Negative findings may support an injured party's claim for damages.

viii Insurance professionals

An insurance broker's main task is to identify the client's risk exposures and seek optimal insurance coverage.⁶⁹ Brokers are independent and not party to the insurance agreement.⁷⁰ Brokering activities entail complicated risks and incorrect advice may cause damage.⁷¹ Authorisation is thus conditional upon fulfilment of applicable insurance requirements.⁷² If the claim concerns a contract between the parties, it is a condition for compensation that there is a breach of contract and that the broker has acted negligently.⁷³

63 NOU 2009:4 'Measures against tax evasion', section 10.11.2.2 and LB-2013-191777. Arguments against alleviation may be that the actions/omissions have a great ability to create damage and have damaged public interests, that preventive considerations strongly oppose alleviation and that auditors have insurance opportunities, security and capital reserves. For liability towards other third parties, see *Grue Savings Bank* HR-2016-2344-a.

64 The preparation of annual accounts shall be carried out in accordance with generally accepted accounting principles, see Section 4-6 of the Act of 17 July 1998 No. 56 relating to Annual Accounts.

65 NOU 2017:15 Appendix 1 Section 2.

66 NOU 2017:15 p. 31.

67 Section 5-3 of the Auditors Act.

68 Section 1 of the Act of 7 December 1956 No. 1 on the Supervision of Financial Institutions etc. (Financial Supervision Act). The Authority conducts audits on the basis of its own risk assessments, reports and other signals such as media reports.

69 <https://www.forsikringsmeglerne.no/engelsk/>.

70 The Act of 10th June 2005 No. 41 on Insurance Mediation (the Insurance Mediation Act) applies to the mediation of direct insurance and reinsurance, including insurance brokers, see Section 1-1 and 1-2.

71 In case LB-2008-87925, the Court of Appeal found that the conditions for compensation were fulfilled, since the broker had not done enough to investigate the market conditions before giving advice. An example of the insurance broker being acquitted of liability is the Court of Appeal's case LB-2005-150175. The appeal was denied to the Supreme Court, see HR-2007-1282-U. In *Dombås Hotel* Rt-2011-1198, the Supreme Court held that the insurance broker, who had given incorrect information to the insurance company about the area measurements of a hotel that had burned down, had held a dual role because he not only represented the hotel, but also performed an extensive amount of work for the insurance company. He could therefore not be said to have acted only on behalf of the hotel and there was no basis for identification between the broker and the hotel.

72 See Section 2-2 No. 3, 4-1 and 4-2 of the Insurance Mediation Act; see Section 2-1 of the Regulations No. 1421 on Insurance Mediation (2005-12-09 No. 1421).

73 LB-2008-87925.

Insurance brokerage firms must comply with good brokering practice.⁷⁴ The broker must provide statutory required information in a clear, accurate and understandable manner.⁷⁵

The complaints board for insurance and reinsurance brokerage provides advisory decisions in disputes between clients and insurance brokerage firms.⁷⁶

A policyholder may expect the insurer to strictly adhere to the terms and conditions.⁷⁷ The client is not necessarily required to investigate the insurance terms closely if he or she has a legitimate expectation that a new insurance policy covers the same damage as the previous policy.⁷⁸

III YEAR IN REVIEW

A mother who had found her son dead while in hospital due to healthcare failure was awarded damages by the Supreme Court, which clarified that liability for mental injuries may be determined if the circumstances represent a particular strain on the parent beyond the loss of, or damage to, the child.⁷⁹

Another case that has been widely debated in the legal community concerned negligent legal advice to a bank regarding a new insurance exemption clause in connection with helicopter leasing agreements. The bank's insurance claim was rejected when its client became insolvent, and its lawyers were held liable for not clearly having pointed out the insolvency exemption.⁸⁰

The Court of Appeal referenced a previous case where an auditor should have clearly pointed out to the client that a particular tax strategy entailed a significant risk that the purpose of the strategy would not be achieved.⁸¹ The subject area was, according to the Supreme Court, an area where stringent requirements are imposed.

There are good reasons to differentiate between subject areas. Tax legislation, limitation rules and formal requirements are statutory and thus relatively available. The situation is less straightforward in contractual negotiations, where a myriad of clauses may be up for

74 Section 5-2 of the Insurance Mediation Act. In addition, the ethical guidelines apply to members of the Norwegian Insurance Brokers Association.

75 Sections 5-4 and 5-5 of the Insurance Mediation Act; see Section 3-1 of the Insurance Mediation Regulations. In LB-2005-77427 the Court of Appeal found that the negligent act had been committed within what must be regarded as the core of the brokerage business; to convey an acceptance or a refusal from an insurance company to an insured person. The appeal was denied to the Supreme Court, see HR-2006-2125-U.

76 <https://www.finanstilsynet.no/forbrukerinformasjon/forsikring/klagenemnda-for-forsikrings--og-gjenforsikringsmeglingsvirksomhet/>. As long as a dispute is considered by the board, it cannot be brought before the courts; see Section 5-2 of Regulations No. 1421 on Insurance Mediation and Section 9-1 of the Insurance Mediation Act.

77 The Supreme Court's case HR-2006-537-a concerned compensation for loss as a result of delayed transfer of an individual pension agreement to another pension facility, which should have been transferred when this was practically possible. A misunderstanding does not exempt the insurer from liability for loss resulting from misconduct regarding contractual obligation towards the customer. The insurer had to replace losses arising from the savings amount being remained in equity funds in a market with falling prices.

78 FinKN-2018-698; see FinKN-2012-646.

79 HR-2018-2080-A. See <https://lovdata.no/pro/#document/HRENG/avgjorelse/hr-2018-2080-a-eng>.

80 LB-2018-27239. The case has been appealed to the Supreme Court.

81 *KPMG Rt-2002-286*.

discussion, including clauses posing only theoretically or commercially acceptable risks. Lawyers should be able to expect that professional clients will read and acquaint themselves with the contract without having to highlight every risk that could potentially materialise in order to avoid being held liable for negligent advice. To impose such a requirement would be cumbersome, not cost-effective and inconsistent with industry practice.⁸²

In the helicopter case, the burden of proving that clear oral advice had been provided was placed on the lawyers, contrary to the claimant's general duty to substantiate his or her claim. As the lawyers also had to substantiate that the bank would have entered into the agreements in the hypothetical set of circumstances, they ultimately bore a double burden of proof.⁸³

Although careful conduct by the bank would have prevented the loss, the court explicitly dismissed the bank's omissions as grounds for exempting the lawyers from liability, but reduced the damages by 60 per cent. Greater emphasis by the courts on an injured party's own gross negligence when assessing liability could perhaps reduce the number of disputes regarding professional liability.⁸⁴

The District Court also imposed a requirement to pay considerable compensation on a law firm and one of its partners when awarding the client almost 89 million kroner for negligent advice relating to a stock sale agreement.⁸⁵ The lawyers argued that clients must ask questions and address unclear issues, and that lawyers must assume that draft agreements and documents are read and understood. The court agreed that lawyers do not have a general duty to double-check that the client has not forgotten or misunderstood an element of an agreement that was subject to negotiations at an early stage; however, in the circumstances of the case, *inter alia* that one of the partner's colleagues had pointed out the liability-inducing misunderstanding to him twice, the court concluded that it was negligent not to address the issue with the client.

82 The rationale of damages is to place the loss where it reasonably belongs. This should not be reduced to a question of documentation where an injured party is considerably to blame for the damage. Contrary to auditors, lawyers do not have a set of statutory acts that should be performed. It is difficult to know beforehand what a court in hindsight will consider important information that should have been documented. Fear of claims can lead to unnecessary work for the lawyer and a higher bill for the client. Not everyone will appreciate extensive emails, which also have the potential of drowning in the client's inbox. Although this documentation may come in handy in the event of a later claim for damage, lawyers should be able to adapt their work on a case-by-case basis, without running an unacceptable risk of becoming liable when the client later claims he or she never heard about a risk-posing clause, although spelled out in the contract.

83 In LB-2005-150175, the Court of Appeal's opinion was that there was no reason for the insurance broker to document in writing what was considered and not recommended or what was recommended beyond what the policyholder chose for insurance coverage. The Court of Appeal thus took a more pragmatic stand to the question of documentation of advice.

84 The injured party's deeds may not only be relevant to reduce damages, but also to eliminate the basis of liability, see Nygaard, 'Skade og ansvar' (2007) p. 303. The case referred to in RG-1988-468 may serve as an example. The Supreme Court briefly addressed the question in *Grue Savings Bank* HR-2016-2344-A paragraph 64 and stated that the role expectations to the professional will be relevant.

85 LB-2018-28987. The case has been appealed to the Supreme Court.

In a recent case from the Court of Appeal, a lawyer was held liable for damages of 1 million kroner in connection with giving advice leading to a settlement. The court assumed that the advice had been clearly irresponsible. The decision is also an example of the court making discretionary assessments relating to the calculation of the loss.⁸⁶

IV OUTLOOK AND FUTURE DEVELOPMENTS

The tendency is that compensation claims are used to shift financial losses onto professionals to a greater extent than before,⁸⁷ and that more stringent claims of documentation are applied by the courts. Specialists will probably continue to gather in the large firms or start up smaller specialist firms.

Increased use of mediation and arbitration may lead to decreased publicity.

Ongoing legislative projects may affect professional liability in certain areas.⁸⁸

86 LB-2018-28987. The deadline to appeal expired on 6 June 2019.

87 See for example <https://www.advokatforeningen.no/radgivning/klientforholdet/profesjonsansvar/> and LF-2018-91155, where the Court of Appeal found that the neglect of the architectural firm was grossly negligent. There was a causal connection between the negligence and the loss, and the claim for compensation could be pursued by the home buyers as third parties in accordance with the Supreme Court's directions in *Bori* Rt-2015-276. See also LF-2016-114800.

88 e.g., the new acts for advocates and auditors, see respectively NOU 2015:3 and NOU 2017:15, including section 8.1 of Attachment 1.

PORTUGAL

Adriano Squillacce and Nair Maurício Cordas¹

I INTRODUCTION

i Legal framework

As general rule, professional liability is subject to the tort liability or contractual liability legal framework, depending on whether or not there is a contractual relationship between the parties to the dispute. Pre-contractual liability may be applicable in some cases.

On one hand, professional liability claims may be brought by the professional's client. The terms and conditions of the agreement entered into between the professional and client govern the extent of the duties and liability of the professional. Nevertheless, professional standards should also be taken into consideration in the assessment of a possible act of professional misconduct through negligence. In this case, professional misconduct should be assessed under the contractual liability framework.

On the other hand, the conduct of professionals may also have a legal impact on third parties. For instance, there is no contractual relationship between investors in bonds issued by a specific company and a rating agency that overrated those bonds as a result of a negligent evaluation that in turn led those investors to subscribe to those bonds, which were not refunded because the issuer became insolvent. In this scenario, the potential professional liability of the rating agency towards the investors should be assessed under the tort liability regime.

The general legal framework of tort and contractual liability is established in the Portuguese Civil Code (PCivC) (Articles 483 et seq. and Articles 798 et seq., respectively). 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, 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 sets out specific provisions on directors' liability, such as the business judgement rule, which exempts directors from liability when they act on a duly informed basis, free from any personal interest and according to reasonable business criteria. In this regard, Law No. 53/2015 of 11 June 2015 on the legal framework

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of professional corporations regulated by professional public associations and the statutes of professional public associations should also be highlighted, as it contains relevant provisions on professional liability, disciplinary measures and administrative infringements.

As general rule, professional liability claims must meet all the following requirements: (1) unlawful conduct (either by act or 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.²

Unlawful conduct by the professional defendant may consist of a breach of contractual conditions or a specific duty of care (either by act or omission). In this regard, the claimant will have to prove that the professional defendant 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).³

In some specific cases, the applicable criterion is more demanding than the average standard of conduct. For instance, matters of liability resulting from the preparation and approval of prospectuses are assessed with reference to high standards of professional diligence pursuant to Article 149 of the Portuguese Securities Code. Furthermore, financial intermediaries and their professionals should always act in accordance with high standards of diligence, loyalty and transparency (Article 304 Section 2 of the Portuguese Securities Code).

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.

2 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).

3 See the ruling issued by the Appeal Court of Lisbon on 8 May 2014, case No. 220040/11.OYIPRT.L1-8, www.dgsi.pt.

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 claimant has the burden of proof as to the causal link regardless of whether tort or contractual liability is applicable. This causal link does not require the proof that the relevant damage resulted directly from the specific negligent misconduct, but rather 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.

Claimants often encounter obstacles to the proof of the relevant causal link, particularly in disputes related to losses resulting from subscription to unsuccessful investments in financial instruments upon the advice of a financial intermediary. In this regard, professional defendants often argue that the financial losses borne by investors resulted from the investment risk rather than any breach of information duties.

Regarding professional negligence cases, some case law relates the causal link to the loss-of-opportunity theory.⁴ 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 relevant profit or avoiding a specific loss.⁵

Lastly, professionals may enter into professional liability insurance policies. Actually, professional liability insurance is 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 (Article 498 Section 1 PCivC) 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 (Article 309 PCivC).

4 See the ruling issued by the Appeal Court of Coimbra on 7 November 2017, case No. 150/15.9T8OHP.C1, www.dgsi.pt: 'Having the lawyer not given his client knowledge of a decision that was entirely unfavourable to the claims formulated in the action that he was mandated to initiate in order to enforce them, thereby preventing the client from appealing (and without which by failing to comply with the statutory time-limit laid down for that purpose and by allowing that decision to become final), thereby rendering it impossible to attack that decision and to reconsider its position before a higher court, such omissive conduct is susceptible of giving rise to an autonomous damage of "loss of procedural chance" or loss of opportunity, and as such subject to compensation.'

5 See the rulings issued by the Supreme Court of Justice on 2 November 2017 and 5 February 2013, 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, pp. 190 et seq.

Specific professionals or acts of misconduct may be subject to special rules on limitation periods. This is the case, for instance, with directors' professional liability (subject to a five-year time limitation), liability resulting from non-compliance with rules applicable to prospectuses (subject to a six-month limitation and a two-year expiry period) and liability of financial intermediaries (subject to a two-year limitation), 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 on which 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 (Article 326 Section 1 PCivC). 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 (Article 327 Section 1 PCivC).

In this regard, it should be noted that the Portuguese Supreme Court 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.⁶

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 (Article 321 PCivC).

Claims for damages based on expired rights become time-barred, which 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 (civil) courts.⁷ When a claim is brought under the tort liability regime, jurisdiction usually lies where the relevant facts (e.g., the unlawful misconduct) took place (Article 71 Sections 1 and 2 PCPC). When a claim is related to the performance or breach

6 See ruling issued by the Portuguese Supreme Court on 22 May 2013, case No. 2024/05.2TBAGD.C1.C1, www.dgsi.pt.

7 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.

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 (Article 80 PCPC).

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 (Article 18 of the Portuguese Administrative Courts Procedure Code).

Judicial proceedings in both civil and administrative courts 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, 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 the submittal of the indictment by the public prosecutor when he or she 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, as, pursuant to Article 1 Section 1 of the Voluntary Arbitration Act,⁸ disputes that (1) are not subject to the exclusive jurisdiction of state courts or to mandatory arbitration, and (2) involve an interest of an economic (patrimonial) nature, may be submitted to arbitration by the parties by means of an arbitration agreement.

Portuguese arbitral proceedings tend not to differ significantly from judicial proceedings, which is to say that they usually have the same procedural phases (i.e., a pleadings phase followed by a preliminary hearing and subsequently by the trial hearing).

8 Law No. 63/2011 of 14 October 2011.

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 (Article 562 PCivC), 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 (Article 564 PCivC).

Pursuant to Article 566 Section 2 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 when the claimant warrants that it is not possible to specify the exact amount of the compensation (Article 569 PCivC and Article 556 Section 1(b) PCPC). If, in the course of the proceedings, the claimant concludes that the existing damage is of a greater amount than previously claimed, he or she may review the claim accordingly.

In cases based on tort liability, the court may award compensation determined on grounds of equity for an amount lower than the existing damage when the professional's liability, based on the degree of guilt, financial status of the parties and further circumstances, justifies such an option (Article 494 PCivC).

Compensation for non-pecuniary or moral damage may also be awarded. The amount of this compensation is determined on grounds of equity (Article 496 PCivC).

Punitive damages are not provided for in Portuguese law,⁹ and there is no cap on the amount of damages that can be awarded.

II 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, approved by Law No. 145/2015 of 9 September 2015.

The Portuguese Bar Association is the public professional association representing professionals who are practising lawyers acting in accordance with the Association's statutes. It ensures access to the law, 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 inscription in the Portuguese Bar Association 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.

⁹ Ruling issued by Supreme Court of Justice on 25 February 2014, case No. 287/10.0TBMIR.S1, www.dgsi.pt.

As a profession subject to registration with a professional association, lawyers' liability is linked to their own disciplinary rules, and breaching these may lead to the lawyer incurring disciplinary or administrative liability, depending on whether the breaches are ethical or administrative.

Lawyers are subject to the Portuguese Bar Association's statutes, which state that lawyers must, inter alia, act with honesty, probity, uprightness, loyalty, courtesy, sincerity and independence.

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-efforts 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. 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 *leges artis* (best practices of the profession).¹⁰

The statutes of the Portuguese Bar Association set out the requirement of mandatory professional liability insurance for lawyers.

ii Medical practitioners

The practice of medical doctors in Portugal 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 inscription in the Portuguese Medical Association is considered a crime of usurpation of functions under the Portuguese Penal Code.

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 do not assume a results obligation in relation to their patients but only a best-efforts obligation. Likewise, 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 *leges artis* (best practices of the profession).

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 damage resulting from unlawful

¹⁰ 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, but only the obligation to defend those interests diligently, according to the *leges artis*, with the aim of overcoming the dispute, and hence the obligation arising from the exercise of this activity is assumed as an obligation of means and not of result.'

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 inscription 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 enter into professional liability insurance, the Portuguese Medical Association currently offers professional liability insurance to all doctors validly registered with the Portuguese Medical Association.

Lastly, professional misconduct by medical practitioners may also raise disciplinary issues (to be addressed by the relevant disciplinary body).

iii Banking and finance professionals

Liability of banking and finance professionals is governed by the Legal Framework of Credit Institutions and Financial Companies (RGICSF) 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, alternatively, 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 (Articles 74 and 75 of the RGICSF). Credit institutions must ensure that all their professionals comply with a high level of technical expertise (Article 73 RGICSF). The prudential assessment of the reputation of banking and finance directors is also guided by high standards for the expertise and skills required (Articles 30-D and 31 RGICSF). Decree-Law No. 81-C/2017 on the rules for credit intermediary activities and for providing credit consulting services sets similar rules on the duties of care of the professionals in these areas (Articles 45 and 66). 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 (Articles 304, 306-A and 308-B of the Portuguese Securities Code).

Specifically with regard to the personal liability of banking and finance directors, the business judgement rule, which exempts directors from liability as mentioned above, is applicable. In this regard, the directors have the burden of proof on the relevant facts, 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 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 (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) (Article 174 of the Portuguese Companies Code and Article 318(d) PCivC).

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 (Article 149 et seq.), investment advisers (Article 301), financial intermediaries and directors (Article 294-C, 304-A, 305-D and 324).

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 (Articles 149 Section 2, 151 and 152 of the Portuguese Securities Code). 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 (Article 152 Section 2 of the Portuguese Securities Code). The right to compensation resulting from non-compliance with 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 (Articles 153 and 243 of the Portuguese Securities Code).

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 (Article 304-B Section 2 of the Portuguese Securities Code). 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 (Article 324 Section 2 of the Portuguese Securities Code).¹¹ In the event of fraud or serious misconduct, a 20-year time limitation is applicable to contractual liability.¹²

Furthermore, investment advisory professionals (Article 301 Section 39(c) and Section 4 of the Portuguese Securities Code), real estate appraisers that render services for banking, insurance and finance institutions and pension funds (Law No. 153/2014 of 14 September 2014) 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 the amount of at least €250,000. This security may be replaced by a director and officer's professional insurance policy (Article 396 of the Portuguese Companies Code).

11 Ruling issued by the Supreme Court of Justice on 17 March 2016, case No. 70/13.1TBSEI.C1.S1, www.dgsi.pt.

12 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.

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. The Bank of Portugal and the Portuguese Securities Market Commission (CMVM) have jurisdiction to conduct and decide on administrative infringement proceedings regarding these matters, 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.

In the absence of specific legislation, the liability of these professionals is generally subject to the general rules of contractual liability set forth 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 (with effect from 25 May 2018) specifically provides for a right to receive compensation from a data controller or processor for any person who has suffered material or non-material damage as a result of an infringement of the Regulation (Article 82).¹³

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 (Article 16 of Law No. 153/2015 of 14 September).

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.

¹³ 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.

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 that are 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.

In certain circumstances, Law No. 41/2015 requires that contractors must prove their economic capacity to execute some types of works; the contractor may circumvent this by taking out a civil liability insurance policy covering an amount equal to the amount of the works to be executed.

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) (Article 115 of the Statutes of the Statutory Auditors Association and Article 82 of the Portuguese Companies Code).

Auditors should act independently and in accordance with the best practices, in accordance with national and international auditing rules (including the International Standards on Auditing (ISA)) and maintain professional scepticism (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).

Auditors are also bound to duties of disclosure and whistle-blowing resulting from their monitoring duties (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). 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 (Article 82 Section 1 of the Portuguese Companies Code). 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 practices and auditing standards.¹⁴

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 (Articles 78 and 82 Section 1 of the Portuguese Companies Code). 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 practices.¹⁵

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.¹⁶ In this regard, 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 (Article 174 of the Portuguese Companies Code).

Auditors may also be held liable for prospectuses according to the terms described above with regard to finance professionals.

14 Gabriela Figueiredo Dias, *Fiscalização de Sociedades e Responsabilidade Civil*, Coimbra, 2006, pp. 93–94.

15 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).

16 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.

It is mandatory for auditors to take out professional liability insurance policies. Usually, these insurance policies are taken out through the Auditors Association (Article 87 of the statutes of the Statutory Auditors Association and Article 10 of the Portuguese Securities Code).

Lastly, professional misconduct by auditors may raise disciplinary issues (to be 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, alternatively, 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 practices, independent criteria and subject to whistle-blowing obligations on public crimes and money laundering (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). 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.¹⁷

Lastly, the professional misconduct of auditors may also raise disciplinary issues (to be 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.¹⁸

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 (Decree-Law No. 144/2006 of 31 July 2006).

17 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.

18 The CMVM also has some supervisory powers in respect of rules of conduct relating to unit-linked life insurance products and transactions.

III YEAR IN REVIEW

Professional liability cases involving banking and finance professionals have been increasing in recent years as a result of the financial crisis of the past decade.

The past year was still marked by litigation resulting from the resolution measure applied by the Bank of Portugal to the Banco Espírito Santo, SA (BES) in August 2014 and its impact on clients' investments (both the clients who invested directly in BES and the clients who invested in the non-financial branch of the Espírito Santo Group upon the intermediation of BES). The biased media coverage on this case also triggered several judicial proceedings for professional liability related to BES. Several civil liability proceedings are still pending and a significant number of cases were dismissed because the legal requirements were not even properly argued, or because of a lack of proof of unlawful conduct and lack of evidence of the required causal link. The audit conducted on the management of the bank Caixa Geral de Depósitos, SA (fully owned by the Portuguese State) in the period 2000–2015 also increased the public debate on the liability of banking and financial professionals, and a specific parliamentary inquiry committee was set to assess potential mismanagement in Caixa Geral de Depósitos, SA and its impact on prospective legal changes.

In addition, although in Portugal there are no official statistics on medical negligence, there has been a considerable increase in the number of cases of alleged medical negligence in recent years. In 2018, several cases of medical negligence went to the trial phase, and legal discussions on this issue are increasing. Nevertheless, medical negligence cases also raise significant difficulties, both in terms of the proof of unlawful conduct and the evidence of the required causal link.¹⁹

IV OUTLOOK AND FUTURE DEVELOPMENTS

The losses resulting from the financial crisis in recent years and public discussions on the liability of banking and financial professionals indicate that professional liability cases in the banking and financial sectors will continue to mark the upcoming year.

Nevertheless, the developments in corporate governance best practices and guidelines will continue and anticipate the implementation of additional preventive measures to avoid litigation on the civil professional liability of directors. For example, the amendment of the Legal Framework of Credit Institutions and Finance Companies (passed by Law No. 109/2017, of 24 November 2017) already included provisions to reduce conflict of interests and enhanced the assessment of reputation of finance and banking directors, *inter alia*, to prevent future litigation on professional liability. On the other hand, discussions on a similar legal regime for listed companies did not have any significant developments since 2017.

¹⁹ For example, see the rulings issued by the Appeal Court of Lisbon on 5 July 2018, case No. 487/12.9TVLSB.L1-8, and 20 September 2018, www.dgsi.pt.

RUSSIA

Magomed Gasanov, Alexander Mikhailov and Anastasia Chagina¹

I INTRODUCTION

i Legal framework

Professionals can be brought to different types of liability, including disciplinary, civil (material), administrative and criminal liability.

Bringing to disciplinary liability means that employer may apply disciplinary measures to an employee for non-performance or improper performance of his or her duties resulted from his or her guilty wrongful conduct.

The Criminal Code of the Russian Federation contains provisions that describe the grounds of criminal liability of professionals. However, most of them relate to violations of safety rules and technical regulations by personnel responsible for their compliance. Separately, criminal liability is established for substantial harm caused to persons by professionals when rendering respective services (including medical services).

The Code of Administrative Offences provides a range of negligence acts, which constitute administrative offences of medical professionals, IT specialists and construction professionals. An act is deemed to be perpetrated through negligence if (1) the person has foreseen the possibility of socially dangerous consequences of his or her actions (omission), but expected without valid reasons that these consequences would be prevented; or (2) the person has not foreseen the possibility of the onset of socially dangerous consequences of his or her actions (omission), although he or she could and should have foreseen these consequences.

Guilt is a necessary condition for professional liability (excluding civil liability).

For instance, according to Article 28 of the Criminal Code of the Russian Federation, if the person did not realise the harm and public danger of his or her actions (omission) or did not foresee the possibility of socially dangerous consequences and should not or could not foresee them due to the circumstances of the case, this act shall be deemed as committed innocently.

Also, an act is considered innocent if the person who committed it could not prevent its negative consequences because of inconsistency between his or her psychophysiological qualities and requirements of extreme conditions or neuropsychic overwork.

Civil liability may of be the following types:

- a contractual liability: when the professional renders his or her services under the civil (not labour) contract, he or she can be held liable for breach of this contract. In this

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case, consequences of violation of the contract are provided in the contract itself and in the Civil Code of the Russian Federation. At the same time, if the professional works under a labour contract (not a civil contract) then he or she could be brought to material liability, which constitutes compensation for the loss, inflicted by the party to a labour contract, as a result of his or her guilty unlawful behaviour (action or omission).² This is specific form of liability with specific limitations; and

- b* non-contractual liability, which includes (1) liability for unjust enrichment; and (2) liability for the damage (tortious liability).

The general rules of tortious liability are specified in Article 1064 of the Civil Code of the Russian Federation, according to which the person who caused the damage to a person or property of a citizen (regardless of his or her professional affiliation) shall reimburse it in full. In some cases, the obligation to compensate for harm may be imposed on a person who did not cause the damage.

In any case, the person shall compensate losses resulting from unlawful behaviour. According to Russian law,³ the losses include the real damage that is an actual value of the losses incurred or as expenses for recovery and the lost profit.

A difference in legal consequences of professional negligence can be clearly seen in cases of unintentional medical mistakes: these mistakes could not be considered as a ground for criminal liability, but injured patients could obtain compensation through a civil case.

The harm caused to the life or health of citizens by activities that create an increased danger to others (a source of increased danger) is compensated by the owner of the source of increased danger regardless of fault.

If the harm is caused by an employee of a legal entity in the performance of its labour (service, official) duties on the basis of an employment contract (service contract), civil responsibility could be put upon this legal entity.

ii Limitation and prescription

For civil claims, the limitation period is established in the Civil Code of the Russian Federation. According to Articles 196 and 200 of the Civil Code of the Russian Federation, the general term within which claims must be commenced is three years from the date when the person knew or should have known about violation of his or her rights and about the person who should be a proper defendant for the violation unless otherwise is established by law.

Meanwhile, the maximum term within which claims should be commenced in any case should not exceed 10 years from the date of violation of rights.

There are some exceptions to this rule specified in the Federal Law on the Securities Market for the following professionals (certain cases set out in the Federal Law):

- a* brokers (the limitation period is one year); and
- b* professional participants of the securities market carrying out management of securities (the limitation period is one year).

Another exception is indicated in the Labour Code. An employer may file a claim for compensation of damage caused by the employee within one year.

2 Article 232 of the Labour Code of the Russian Federation.

3 Article 15 of the Civil Code of the Russian Federation.

As for criminal cases, time limits are established in the Criminal Code of the Russian Federation and depend on gravity of the crime. The Criminal Code provides the following categories of negligent crimes depending on the nature and degree of social danger:

- a* crimes of little gravity (minor crimes), which are those negligent crimes for committing of which the maximum term of imprisonment does not exceed three years – for these crimes, professionals may be held liable within two years of the date of commission of the crime; and
- b* medium-gravity crimes, which are negligent crimes for which the maximum term of imprisonment exceeds three years. Professionals may be held liable within six years of the date of commission of the crime.

iii Dispute fora and resolution

The civil litigation procedure in relation to professional liability claims is governed by the Civil Procedure Code of the Russian Federation (the CPC RF). Prosecution of criminal claims is governed by the Criminal Procedure Code of the Russian Federation.

Generally, professional liability claims are brought in the courts of general jurisdiction. According to the Federal Law on Courts of General Jurisdiction, respective courts consider all criminal cases and all civil and administrative cases on protection of violated or disputed rights, freedoms and lawful interests, except for cases considered by other courts.

Certain professional liability claims may be brought to the justice of the peace. According to the Federal Law on Justices of the Peace, the following cases are considered by justices of the peace:

- a* criminal cases, for which maximum punishment does not exceed three years of deprivation of freedom;
- b* property disputes, except intellectual property disputes, if the amount of the claim does not exceed 50,000 roubles; and
- c* administrative offence cases if these cases are brought to the justice of the peace according to the Code of Administrative Offences.

Pursuant to Article 28 of the CPC RF, the claim shall be brought to the court located in the place where a company defendant has its registered office or an individual defendant is registered (domiciled). In some cases, as provided in Article 29 of the CPC RF, the claimant may file the claim to the other court, for example, to the court located in the claimant's place of domicile if the case concerns recovery of the damage, or to the court located in the place of performance of the labour contract if the claim is based on violation of labour contract.

The criminal case shall be considered by the court located in the place where the crime was committed.⁴

Civil claims may be resolved amicably (by way of negotiations) and through judicial proceedings. Even if the claim has been filed to the court and judicial proceedings have started, the parties may conclude an amicable agreement that terminates the court proceedings. An amicable agreement concluded after the start of the court proceedings shall be approved by the court.

Criminal claims shall be considered by the court. Only criminal cases for crimes of little and medium gravity may be resolved and terminated by reconciliation with the victim

⁴ Article 32 of the Criminal Procedural Code of the Russian Federation.

in the event the accused person compensates the damage.⁵ Reconciliation with the victim is possible only until the court departs to the retiring room for passing the sentence in courts of first instance or until the court departs to the retiring room for passing the judgment in the court of appeals.

iv Remedies and loss

In accordance with Article 15 of the Civil Code of the Russian Federation, the losses include the real damage (which is an actual value of the losses incurred or expenses to the recovery of losses) and the lost profit.

The most common remedy is filing the claim on collection of damages. The burden of proof of the claimant includes the fact of damage, the negative consequences, the cause and effect relation between the damage and consequences and the guilt of the violator (with certain exceptions).

According to clarifications of the court practice made by the Supreme Court of the Russian Federation, the court shall not dismiss a damages claim only on the basis of the impossibility of calculating the amount of damages. The court should define the amount of damages based on the case circumstances, according to the principles of justice and proportionality of the violation.

There is no distinct formula to calculate a value of such a compensation, which is totally subjective and depends on a judge's discretion. The most common method of assessing is a specialist opinion obtained in an out-of-court procedure or results of the court-appointed expert examination.

The injured person may also demand compensation for moral damage. The amount of moral damage for suffering can be established by an agreement between parties or by a court. The average amount of moral harm compensation in practice varies from 30,000 roubles to 1 million roubles in the most serious cases.

The main problem of collection of damages in Russia is that Russian courts traditionally are rather reluctant to collect the damages because of the formalistic approach to evidencing the cause and effect relationship. Even in the event of collection, the amount of damages collected could be rather small, especially for moral harm. The situation has changed slightly and positively, but still successful cases are far from ordinary.

II SPECIFIC PROFESSIONS

i Lawyers

Russian law provides for dualism in the legal profession. On the one hand, the law generally allows any person who has not passed any qualifying exams or who does not have a law degree to practice law and provide legal services; on the other hand, some specific legal services (e.g., defence in criminal cases) can be rendered only by attorneys at law who have passed regional qualification exams and have obtained the special status of advocate.

Respectively, non-advocate practitioners do not bear any professional liability. Their actions are not regulated by any professional standards or specific bodies. They could be held liable for non-performance or improper performance of their services rendered under the contract as it is established in the contract and in the Civil Code of the Russian Federation.

⁵ Articles 25 and 76 of the Criminal Procedural Code of the Russian Federation.

Meanwhile, an advocate's activity is regulated by the Federal Law dated 31 May 2002 No. 63-FZ on Advocate Activity and Advocacy (the Advocate Law) and the Code of Professional Ethics of Advocates, adopted by the First All-Russian Attorneys' Conference.

The Advocate Law provides some special requirements for persons who would like to become advocates, such as obtaining a university law education, having working experience in law and absence of criminal records.

The Code of Professional Ethics of Advocates contains a wide range of prescriptions that are binding for an advocate. Violation of any of the mentioned legal prescriptions may lead to deprivation of the advocate's status. Qualification commissions of regional exams may make such decisions upon the complaints and recommendations of governing bodies.

In addition, unlike other attorneys, each advocate should insure against the risk of professional liability for violation of the terms of the legal assistance agreement concluded with the principal.⁶

In practice, lawyers can be brought to criminal liability for legal help when its purpose was facilitation of committing a crime. In such a case, his or her advice can constitute an accessory to a crime.

ii Medical practitioners

Under the Federal Law dated 21 November 2011 No. 323-FZ on the Basics of Public Health of the Russian Federation (the Health Law), medical aid has to be rendered according to the rules of medical help, on the basis of clinical recommendations and taking into account standards of medical help. Named acts are adopted by the Ministry of Public Health of the Russian Federation. Medical practitioners are obliged to follow those regulations.

Criminal liability for medical practitioners whose negligent actions lead to a death of a patient, subject to Article 109 of the Criminal Code of the Russian Federation – 'Causing death by negligence', is punished by up to three years' imprisonment with disqualification. Similar actions, leading to grievous bodily harm, are subjected to Article 118 of the Criminal Code – 'Grievous bodily harm by negligence', which is punished by up to one year's imprisonment with or without disqualification.

A person can be held liable for committing the above-mentioned crimes when three following conditions coincide: defect of medical aid, death of the patient (grievous bodily harm) and a cause-effect link between them.

Defects of medical care are mainly established during the examination, which determines the causes of negative health consequences, as well as a compliance with the rules of medical help, clinical recommendations and standards.

Liability of medical practitioners for less dangerous violations of law is established in the Code of Administrative offences (e.g., violations of rules in the sphere of medical products' circulation; and violation of the requirements of the legislation in the field of health care during abortion procedures).

Medical practitioners may insure the risks of their professional liability.⁷

6 Article 7 of the Advocate Law.

7 Article 72 of the Health Law.

iii Banking and finance professionals

Banking and financial activities are governed by the Federal Law dated 2 December 1990 No. 395-1 on Banks and Banking Activity, the Federal Law dated 22 April 1996 No. 39-Φ3 on the Securities Market, the Federal Law dated 07 February 2011 No. 7-Φ3 on Clearing, Clearing Activity and the Central Counterparty and the Federal Law dated 29 November 2001 No. 156-Φ3 on Investment Funds.

The specific consequences of violation of law by banking and finance professionals may be the following:

- a* administrative liability according to Articles 15.24.1 'Illegal issue or conversion of documents certifying monetary and other obligations' and 15.29 'Violation of legislation related to activity of professional participants of the security market, repository, clearing organisations, persons carrying out functions of the central counterparty, joint stock investment funds, non-state pension fund, management companies of joint stock investment funds, share investment funds or non-state pension funds, specialist depository of joint stock investment funds, share investment funds or non-state pension funds' of the Code of administrative offences;
- b* criminal liability according to Articles 172.1 'Falsification of financial documents and accounting documents of financial organisation', 172.3 'Failure to insert information on money placed by individuals and individual entrepreneurs to financial documents and accounting documents of credit organisation' and 312 'Illegal actions in relation of property which is subject to description, arrest or confiscation' of the Criminal Code; and
- c* civil liability for violation of the contract or for damage not related to the contract.⁸

Laws establish certain requirements for some banking professions. For example, the chief of a credit organisation or chief of the branch of a credit organisation shall obtain higher education and there should not be criminal records. Credit organisations, including banks and joint-stock investment funds, shall obtain a licence from the Central Bank of the Russian Federation. Financial consultants (brokers, dealers) shall have a licence to carry out broker or dealer activities as well. Numerous violations of the banking laws could be considered as the grounds for termination of the licence.

iv Computer and information technology professionals

The liability of computer and information technology professionals can be either contractual or tortious as provided above, depending on the specific case.

In other words, the activity of computer specialists does not have special regulation. They bear general liability according to the Labour Code of the Russian Federation if they are hired, or according to the Civil Code of the Russian Federation if they render services based on civil contracts or cause damage.

⁸ Article 1064 of the Civil Code of the Russian Federation.

However, the Criminal Code of the Russian Federation prohibits some particular computer crimes, such as unlawful access to computer information protected by law,⁹ violation rules on use, storage and processing of computer information¹⁰ and unlawful influence on the critical information infrastructure of the Russian Federation.¹¹

v Real property surveyors

In Russia, real property surveyors are named as cadastral engineers. Their activity is governed by the Federal Law dated 24 July 2007 No. 221-ФЗ on Cadastral Activity (the Cadastral law).

The Federal Service for State Registration, Cadastre and Cartography supervises cadastral activity.

The cadastral engineer shall be a member of a self-regulated organisation of cadastral engineers.

The cadastral engineer shall enter into insurance contract on insurance of his or her civil liability for damage caused to clients or third parties when performing cadastral activity violating the law. It is a mandatory requirement of the Cadastral Law.¹²

The cadastral engineer could be brought to civil liability on compensation of damage as described above.

The self-regulated organisation may also apply disciplinary measures in respect of the cadastral engineers, which could include termination of membership.

vi Construction professionals

Criminal liability for the negligence of a construction professional is established in the rules of law of the Chapter titled 'Crimes against Public Safety' of the Criminal Code.

According to Article 216 of the Criminal Code, violation of the safety rules in the construction or other works, if it resulted in causing grievous bodily harm or major damage, is punished by imprisonment up to three years with or without disqualification. The same actions leading to death of two or more people is punished by imprisonment of up to seven years with or without disqualification.

A person can be charged with committing such a crime only when both the fact of violation of special rules and causal relationship between this violation and the consequences are established and sound.

General conditions of liability for a violation of labour protection requirements (regardless of the sphere of operation) are established in Article 143 of the Criminal Code. The subjects of this crime may be the heads of organisations, their deputies, chief specialists, heads of structural subdivisions of organisations, specialists of the labour protection service and other persons who are charged with ensuring compliance with labour protection requirements.

Liability for less dangerous violations of law is established in Chapter 9 of the Code of Administrative offences titled 'Administrative Offences in Industry, Construction and Energy'.

9 Article 272 of the Criminal Code.

10 Article 274 of the Criminal Code.

11 Article 274.1 of the Criminal Code.

12 Article 29.2.

vii Accountants and auditors

The professional activity of accountants is regulated by the Federal Law dated 6 December 2011 No. 402-FZ on Accounting (the Accounting Law) and the professional standards introduced by the Ministry of Labour and Social Protection of the Russian Federation. Article 7 of the Accounting Law establishes requirements for accountants who perform accounting activity in public joint-stock companies, insurance companies, investments and non-budgetary funds, which are: a university education; no less than three previous years from the latest five of experience in accounting or audit; and the absence of a criminal record for economic crimes. Some other requirements are applied to accountants performing activities in specific spheres (like leasing, banking and other activities) and established in respective laws.

Liability of accountants is provided by the Labour Code of the Russian Federation and Civil Code of the Russian Federation is as stated above.

However, according to the Federal Law dated 26 October 2002 No. 127-FZ on Insolvency (Bankruptcy) (the Bankruptcy Law), accountants could also be brought to subsidiary liability in the event of bankruptcy of an organisation where they performed activity. Article 61.11 Part 2 Paragraph 2 of the Bankruptcy Law stipulates that the accountant could be held liable for absence or accounting documents or absence of necessary information in accounting documents if this fact led to obstacles in the bankruptcy case and, therefore, impossibility of settling creditors' claims. The liability of accountants in this case is presumed unless they proved otherwise.

Professional activity of an auditor is governed by the Federal Law dated 30 December 2008 No. 307-FZ on Audit Activity (the Audit Law), Rules on independency of auditors and auditor organisations (approved by the Counsel on Audit Activity as of 20 September 2012, Protocol No. 6) and the Code of Auditors' Professional Ethics (approved by the Counsel on Audit Activity as of 22 March 2012, Protocol No. 4). Pursuant to Article 4 of the Audit Law, the auditor shall obtain the qualification certificate, be a member of one of the self-regulatory organisations and be included in the register of auditors.

Insurance is not binding for an auditor. However, according to Article 13 Part 1 Paragraph 4.1 of the Audit Law the auditor may insure liability for violation of the contract or for damage caused during performance of the audit activity.

The consequences of violation of the law by auditors are following:

- a* applying of disciplinary actions;¹³
- b* prosecution for abuse of powers;¹⁴ and
- c* civil action for violation of the contract or for damage not related to the contract.¹⁵

viii Insurance professionals

Insurance activity is governed by the Law of the Russian Federation dated 27 November 1992 No. 4015-1 on the Organisation of Insurance Activity in the Russian Federation (the Insurance Law).

The Central Bank of the Russian Federation exercises control over the insurance activity.

13 Article 20 of the Audit law, applied by self-regulatory organisations of auditors.

14 Article 202 of the Criminal Code of the Russian Federation: a minor crime, unless it is committed in respect of the underaged when it is a the crime of medium gravity.

15 Article 1064 of the Civil Code of the Russian Federation.

Insurance activity is performed by (1) insurance companies, (2) reinsurance companies, (3) mutual insurance companies and (4) insurance brokers. All of them shall obtain the respective licence from the Central Bank of the Russian Federation.

The Insurance Law provides special qualification requirements for CEOs, chief accountants of insurance companies and other managers.¹⁶

Insurers bear civil liability as provided by the Civil Code of the Russian Federation and described above.

In addition, pursuant to Article 32.5-1 of the Insurance Law, where the insurer violates the law, the Central Bank may issue a regulation with a description of the particular actions the insurer shall comply with and the term for performing the regulation. If the insurer violated the law several times, the supervising authority may restrict or prohibit entering into some transactions and limit or suspend the licence.¹⁷

The administrative liability is provided in Chapter 15 of the Code of Administrative Offences of the Russian Federation.

The Criminal Code of the Russian Federation prohibits fraud when performing insurance activity¹⁸ and providing knowingly false information to the Central Bank of the Russian Federation.¹⁹

III YEAR IN REVIEW

The legislation related to professional liability slightly changed in 2018.

On 29 November 2018, the Supreme Court of the Russian Federation has adopted the resolution on Court Practice in Criminal Cases on Violations of Labour Protection Requirements, Safety Rules When Conducting Construction or Other Works, or Industrial Safety Requirements of Hazardous Production Facilities. It recognises the possibility of hiring third-party organisations to provide services in the field of labour protection, for which they will be liable in the event of its violation.

IV OUTLOOK AND FUTURE DEVELOPMENTS

It is expected that several draft laws that provide certain amendments to legislation on professional liability may be adopted in the coming year.

The Ministry of Health of the Russian Federation has proposed the draft of amendments to the Code of Administrative Offences (Draft No. 02/04/02-19/00088778) according to which it is expected to decriminalise the liability of medical practitioners for a first violation of rules of traffic in narcotic drugs and psychotropic substances. Medical practitioners may be brought to administrative liability and shall pay fines instead of criminal liability.

According to another draft law (Draft No. 01/05/12-18/00087432), it is proposed to decriminalise the liability of medical practitioners that use high-potent anaesthetic narcotic drugs in their work. It is supposed to establish administrative liability for individuals for

16 Article 32.1 of the Insurance Law.

17 Articles 32.5-1 – 32.7 of the Insurance Law.

18 Article 159.5 of the Criminal Code.

19 Article 172.1 of the Criminal Code.

violation of rules on trafficking narcotic and psychotropic drugs and rules on storage, realisation, transportation, use, import, export and destruction of plants containing such drugs.

The Ministry of Health has been also suggested preparing a draft law on issues related to compulsory insurance of professional liability of medical practitioners, but there is no concrete draft yet.

Also, the Ministry of Justice has introduced the draft of the Government Resolution titled 'Concept of Regulation of the Professional Legal Market'. It is proposed that new rules will apply after 2023. According to this, it is expected to establish a 'monopoly' of advocates for representation in courts and to eliminate the dualism of the legal profession in this sphere, namely only those attorneys who have an advocate status may represent their clients in Russian courts.

SPAIN

*Alejandro Ferreres Comella*¹

I INTRODUCTION

i Legal framework

Professional liability is governed in Spain by general tort regulations. In those cases in which there is a contractual relationship between the professional and the damaged party (client), the contract is the main source of the provisions on the liability arising from the former's performance. Professionals' duties of care are normally standardised by sector or profession and usually supplement contractual provisions. Standardised duties of care are either set forth in codes of conduct or protocols (such as in the case of lawyers or medical practitioners), or in case law.

Professionals' malpractice may have an impact on third parties that do not have a contractual relationship with the negligent professional (e.g., injury caused to pedestrians by the collapse of a building with construction defects).

The general legal framework of tort and contractual liability is set forth in the Spanish Civil Code (Article 1101 et seq. and Article 1902 et seq., respectively). Specific acts of professional misconduct may also be considered crimes or administrative infractions governed by the Spanish Criminal Code or specific criminal and administrative laws (for instance, the regulations applicable to lawyers can give rise to administrative sanction proceedings that are separate from their civil liability in relation to clients arising from misconduct).

Professionals' liability is subject to the regulation and principles of liability for defective service. This means that professionals are generally not obliged to guarantee a specific outcome, but their performance needs to conform to certain standards of due diligence (thus, lawyers are not obliged to guarantee a specific outcome to the cases on which they advise, in the same way that doctors are not obliged to guarantee that patients will be cured as a result of their treatment, but the legal counsel provided and the medical treatment administered must meet the applicable standards of care).

As general rule, for there to be professional liability there must be: (1) unlawful conduct (either an act or omission) of the professional; (2) wilful or negligent misconduct (except in cases of strict liability); (3) a causal link between the professional's conduct and the damages claimed by the claimant; and (4) damage (either actual losses or loss of profit).

Professional negligence is normally related to the professional's failure to comply with rules set forth in sector-specific regulations, codes or protocols or with standards of care defined in case law (developed over time and when there are no specific regulations). Thus,

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it will normally be sufficient for a plaintiff to prove that the professional did not honour the standard of care set out in the regulations or case law. Furthermore, in some specific cases (such as medical malpractice), professional malpractice can be presumed or indirectly proven (i.e., the *res ipsa loquitur* doctrine applies to medical malpractice, as discussed below).

Proving causation may be difficult for plaintiffs. In Spain, the standard of proof of factual causation is, in theory, high. The Supreme Court formally requires that the evidence of the existence of a causal link must be clear and precise, and not based on mere deduction, conjecture or probability. Therefore, in principle, it requires absolute evidential certainty.

Consequently, in Spain, doctrines such as that expressed in the ‘more-probable-than-not’ rule are, in theory, excluded. As such, statistics (or epidemiology, which may be relevant in medical malpractice cases) would not be sufficient by themselves to prove a causal link.

In practice, however, on many occasions judges and courts reach decisions that come close to applying the more-probable-than-not rule, in particular by recourse to a judicial presumption (*praesumptio juris*). This presumption allows the judge or court to apply rules of human logic to deduce a fact and deem it proven (deduced fact) on the basis of the evidence of one or more ‘basic facts’.

On other occasions, judges and courts have used statistics and epidemiology – which are insufficient by themselves to establish the causal link – in combination with other basic facts provided as evidence to determine the causal relationship.

Spanish case law has developed legal causation theories similar to proximate-cause theories. For example, the courts have identified the ‘objective imputation criterion’, which includes theories aimed at limiting liability such as foreseeability (commonly referred to as the adequate-cause defence in Spain), *ex post* events (known as the German rule of *regressverbot und Garantenstellung*), the ‘harm-within-the-risk’ rule, etc.

In those cases in which the professional’s negligence is particularly serious and sufficient to amount to a criminal offence, the civil liability arising therefrom is dealt with as part of the criminal prosecution proceedings.

Finally, as a general rule, professionals take out professional liability insurance. In fact, professional liability insurance is mandatory for some professionals, including lawyers, medical practitioners, auditors, insurance intermediaries, real estate agents, credit intermediaries and credit or financial consultants.

ii Limitation and prescription

The statute of limitations rules applicable to professional liability depend on whether or not there is a contract between the professional and the damaged party.

Contractual liability, unless the contract provides otherwise (which is unusual in Spanish contracts), is subject to a five-year limitation period. However, this statute of limitations rule results from a recent amendment of the 1889 Civil Code (passed in October 2017). This amendment includes transitory provisions that apply to legal actions related to the infringement of obligations that existed prior to the entry into force of the amendment. These actions must be brought within 15 years of the infringement occurring, or within five years of the date the reform entered into force (i.e., by 7 October 2020), whichever date falls first.

Specific limitation periods exist for some sectors, such as construction or auditing, which we address below.

Non-contractual liability is subject to a one-year statute of limitations rule. The Spanish Supreme Court has clarified that the one-year period runs only from the moment that the

aggrieved party is fully aware of the existence of the damage suffered and it is definitive (i.e., in the case of 'continuing damages', the statute of limitation period does not start until the arising of damages ceases).

A limitation period can be interrupted by the damaged party issuing an out-of-court request claiming the damages from the professional. Every time that an out-of-court request is issued, the one-year term restarts from the beginning.

iii Dispute fora and resolution

Professional liability claims are normally dealt with by the judiciary in Spain. Arbitration clauses may be used in some cases, such as construction claims, to resolve an issue connected with the contractual liability of the professional in relation to the damaged client. Obviously, arbitration clauses do not exist in non-contractual liability cases. And even in those cases in which there is an arbitration clause, certain types of damages claims may not be subject to arbitration (e.g., personal injuries arising from professional negligence).

Professional liability claims are normally dealt with by the civil courts and in particular by the courts of first instance.

There are two basic declarative procedures for seeking payment of compensation: verbal proceedings and ordinary proceedings. These are regulated in the Civil Procedure Law of 7 January 2000. Which stream a case falls under depends on the amount claimed: (1) where compensation of up to €6,000 is sought, the claim is handled in verbal proceedings; and (2) where the amount claimed is more than €6,000, the claim is handled in ordinary proceedings.

Professional negligence cases will normally be handled in ordinary proceedings.

In both cases, the civil procedure starts with the filing of the claim. The claim must include all factual allegations, set out in as much detail as possible, as well as the legal grounds on which it is based. However, under the principle of *jura novit curia*, (1) the plaintiff is not required to set out the legal grounds in thorough detail, and (2) the legal grounds invoked are not binding upon the judge, who may uphold the action based on alternative legal grounds.

If verbal proceedings are initiated, once the claim has been filed and given leave to proceed, the defendant is given a term to file a defence (or a counterclaim brief) of 10 working days (which includes every day of the year except Saturdays, Sundays, national holidays, non-working days in the autonomous region or city where the proceedings take place, and the month of August). This period cannot be extended except when both parties agree to stay the proceedings. Subsequently, the court will call the parties to a hearing in which they propose the evidence they are going to submit, the evidence is produced and the final conclusions are presented – all in the same hearing.

If ordinary proceedings are initiated, once notified of the lawsuit, the defendant has a 20-working day term to file a brief of response. This period cannot be extended except when both parties agree to stay the proceedings. Any allegation, documentary evidence and expert reports on the facts or events on which the defence is based must be attached to the brief of allegations. It is unlikely that any other documents will be accepted subsequently.

The court then calls the parties to a preliminary hearing in which they propose the evidence they are going to submit. The court then summons the parties to the trial where the evidence and final conclusions are presented. Although the Civil Procedure Law sets forth that the trial should be held within one month of the preliminary hearing, it is very common

for the trial to be scheduled for between two and 12 months after the preliminary hearing, depending on the court's workload. If there are a lot of witnesses and experts to be heard, the court may schedule more than one day for the trial.

No discovery proceedings for plaintiffs

The Spanish legal system does not provide for a general disclosure procedure.

However, provision is made for coercive measures in relation to document disclosure in two specific situations.

Preliminary proceedings

Preliminary proceedings are simply aimed at preparing the proceedings (and therefore take place before the lawsuit is filed) and allow the potential plaintiff to verify that its intended claim and defendant are appropriate. In other words, the preliminary proceedings are very short and specific proceedings that the plaintiff is entitled to start if it needs to verify basic aspects of the claim. An example of a situation in which a plaintiff may consider using preliminary proceedings is to request the exhibition of an insurance policy when the exact scope of the insurance coverage will be under discussion in the main proceedings.

If the court gives leave for the preliminary proceedings to proceed, it will call the parties to a hearing where the request will be made (either to disclose documents, show the object of the claim or respond to the plaintiff's questions). The decision to call the parties to this hearing can be challenged by the defendant, but if this opposition is dismissed, the law provides that, depending on the type of request, the court may consider responding affirmatively to the questions that the plaintiff poses or even entering and searching premises to obtain documents requested by the plaintiff in cases where the person or entity to which they refer or who is in possession of the documents refuses to disclose them.

Ordinary proceedings

During ordinary proceedings, each party may request the others to disclose documents referring to the object of the proceedings. The requesting party must provide a photocopy of the requested document or, in the absence thereof, indicate the contents of the requested document as accurately as possible.

Should the party or parties unjustifiably refuse to disclose the requested private documents, the court may either (1) rule that the copy provided by the requesting party has evidentiary value, or (2) issue an express order for the documents to be furnished, when it is advisable given the nature of the documents, the other evidence brought to the proceedings and the contents of the allegations and claims made.

Unlike in preliminary proceedings, here the law does not allow for premises to be entered and searched in the event of a refusal to disclose documents. However, the party that refuses to disclose documents requested by the court may be considered guilty of the criminal offence of disobedience, which can be sanctioned with imprisonment of up to 12 months.

The role of expert witnesses

Expert witnesses can play a vital role in professional negligence cases in establishing whether or not the professional has met the standards of care applicable to his or her performance, proving the damage suffered by the plaintiff or the causal link between the professional's negligence and the damage suffered.

Expert reports must be proposed and submitted by the parties in their respective briefs of allegations. Only in the following exceptional circumstances can they be submitted afterwards:

- a* for reasons of lack of time, a party may announce that the report will be attached to its pleadings brief at a later date (but in any case before the preliminary hearing);
- b* as a consequence of the allegations made by the defendant in its response, or as a result of the occurrence of new facts, or as a result of additional allegations made by the parties before or during the previous hearing; and
- c* when a request to extend the scope of the expert witness report is made during the hearing.

Moreover, a party can request the court to appoint an expert:

- a* when it waives its right to appoint an expert in the brief of allegations; or
- b* as a consequence of the allegations made by the defendant in its response, or as a result of the occurrence of new facts, or as a result of additional allegations made by the parties before or during the preliminary hearing.

Either at the time of attaching the expert witness report to the initial brief of allegations or to the additional allegations, or during the preliminary hearing, the parties (and sometimes the court, when it deems it necessary) must indicate whether they want their expert or the one proposed by the opposing party to appear during the trial for the purpose of (1) further explaining the report; (2) answering questions; (3) undergoing cross-examination by the opposing party; or (4) challenging the other parties' expert witness.

iv Remedies and loss

The Spanish civil liability system is based on compensatory grounds. Consequently, indemnifiable damages should match the impairment or loss suffered by a person (or his or her property) as a result of a given event or fact.

Indemnifiable damages include both purely economic damages and 'non-material damages' (which includes, for instance, for suffering or pain). In the Spanish legal system, whenever compensation is sought, the plaintiff must prove not only the existence of damage, but also the scope and the means of calculating the compensation being claimed.

Punitive damages are not contemplated in the Spanish legal system.

Spanish tort law does not ban *in natura* compensation, by virtue of which a consumer seeks to be restored to a situation as similar as possible to that in which he or she would have been had the service provided by the professional not been defective.

In the specific case of medical practitioners' liability, *restitutio in natura* might be a possibility in certain specific cases. For example, in the case of a negligent late diagnosis of a disease, the patient may be awarded the right to receive medical monitoring as compensation for the anxiety that the late diagnosis caused.

Compensation includes direct damages, indirect damages (although remoteness theories are applied to some extent by Spanish courts, with the purpose of limiting the damages that are awarded) and loss of profits (*lucrum cesans*).

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Spain are subject to the regulations set out in the 2001 Spanish Lawyers General Regulation and the 2002 Spanish Lawyers Deontological Code. The General Regulation sets out lawyers' obligations and duties of care in their dealings with peers and in providing legal services to clients. Lawyers' obligations towards their clients include the obligation to (1) keep clients appropriately informed of developments in the case and to provide them with a minimum and fair assessment of the probabilities that the clients' position will prevail; (2) store appropriately the documents provided by clients; (3) return the documents to clients at the end of the case; (4) comply with confidentiality rules; and (5) know the law and the case law.

The infringement of the Deontological Code gives rise to administrative sanctions imposed by the Spanish bar associations and may also give rise to professional liability claims.

However, beyond the eventual infringement of the Deontological Code, lawyers' negligence in their rendering of legal services may additionally involve civil liability for the damage caused to clients.

The Spanish Supreme Court has issued several decisions on lawyers' civil liability. In this case law, the Court has held that to establish the amount of the damages arising from the lawyers' negligence, the cost of the loss of opportunity must be assessed. Thus, the court that has to decide on a lawyer's liability has to assess what the result of the case would have been had the lawyer not acted negligently. Thus, if the lawyer negligently failed to file a brief of defence or an appeal in due time, or negligently addressed a legal issue, the court needs to assess whether the defence or the appeal would have prevailed or whether the legal action would have been successful if the lawyer had approached it properly. This is not an easy assessment, as the Spanish Supreme Court has confirmed in most of its case law. For that reason and unless the assessment of the probability of a different result is very clear, the Spanish Supreme Court limits clients' compensation to something equivalent to moral damages for the loss of opportunity.

Lawyers must have civil liability insurance. As a matter of fact, all Spanish lawyers obtain insurance coverage through their compulsory membership of a Spanish bar association. Additionally, law firms are obliged to take out an insurance policy to cover their civil liability, in addition to the individual policies that each of their lawyers are also obliged to take out.

ii Medical practitioners

Medical practitioners are subject to the general Spanish law of tort. However, the Spanish Supreme Court has developed a set of specific rules and principles that apply to their activity.

- a Medical practice is the provision of a service. This means that medical practitioners are not obliged to deliver (to guarantee) a given result (i.e., medical practitioners cannot be found liable if a patient is not cured, provided that they have diligently performed their duties). However, cosmetic surgery and odontology are an exception to this general rule; practitioners are subject to strict liability if they are not able to deliver the cosmetic result or the dental treatment solution requested by the patient.
- b There is a set of standards of care that derive from past clinical experience and generally accepted protocols for clinical diagnosis and treatment, which is known as *lex artis*.
- c The disproportionate-result or *res ipsa loquitur* theory (which is applicable when the damaging effect suffered by the patient as a result of clinical treatment is not

proportionate to the one normally expected) results in a presumption that the medical practitioner did not comply with *lex artis*. Thus, the burden of proof passes to the medical practitioner to show that he or she acted correctly.

- d Proving causation in cases of treatment malpractice is not a simple issue when the underlying disease or condition is at an advanced stage. Expert witness testimony is particularly relevant in these civil liability cases.

Insurance coverage is also mandatory for medical practitioners.

In the case of medical practitioners who have an employment or contractual relationship with private or public hospitals, medical malpractice legal actions are normally directed against both the hospital and the medical practitioner on the basis of their joint and several liability.

iii Banking and finance professionals

Banking and finance professionals are not subject to any specific civil liability regime but to the general Spanish law of tort.

However, banking and finance professionals are subject to some sector regulations that set out duties of care in the provision of financial services, and in particular in the offering of investment products to clients.

Law 10/2014 of 26 June 2014 on the Regulation, Supervision and Solvency of Credit Institutions (which regulates, among other matters, the suitability of senior officers, corporate governance and remuneration policies in banks and other financial entities), Law 24/1988 of 28 July 1988 on the Securities Market (which regulates the obligations of bankers and finance professionals to inform investors, and prospectus requirements), and Law 35/2008 of 4 November on Collective Investment Institutions together form the basic legal framework setting out the obligations and duties of care applicable to banking and finance professionals.

It should be noted, though, that if a banking or finance professional fails to meet the standard of care required in the sector regulations, civil liability claims will normally be addressed to the bank or financial entity and not the professional.

iv Computer and information technology professionals

There is no specific legal regime applicable to computer and IT professionals in Spain. Computer and IT professionals may be civilly liable for damage caused to their clients – or to third parties – because of the defective design of computer applications and programs or defective maintenance of the same. Disruptions to the functioning of computers (or computer programs) is the most frequent source of conflicts.

Civil liability of computer professionals will normally be based on contractual liability (for the failure of the computer program to fulfil the provisions of the contract), but may also give rise to non-contractual liability in cases in which third parties alien to the contractual relationship have been damaged by the computer professional's negligence (e.g., in those cases in which the lack of sufficient firewalls in a computer program facilitated hackers' access to personal data or corporate financial information). While the existence of a cyberattack may allow the computer professional to argue proximate-cause defences (such as superseding-cause theories), the courts may still find him or her partially liable for the damaging result.

Computer and IT professionals are under no obligation to contract a civil liability insurance policy. However, as a general rule they tend to do so and this is a growing insurance market.

v Real property surveyors

When acting as construction developers, property surveyors are jointly and severally liable under the civil liability regime applicable to construction professionals (see Section II.vi).

Property surveyors acting as real estate agents are subject to the specific regulation set out in Royal Decree 1294/2007 on the General Bylaws of the Associations of Real Estate Agents. This Decree establishes obligations that real estate agents must comply with in their role as intermediaries between real estate sellers and buyers. The infringement of these obligations can result in administrative sanction proceedings, but also in civil liability actions initiated by any person or company that suffers financial damage as a consequence of the infringement. This regulation obliges real estate agent associations to take out insurance that covers the civil liability of their members.

vi Construction professionals

Construction professionals are governed by the 1999 Construction Law (Law 38/2005 of 5 November 1999). It establishes that the plot developer and construction professionals (including the constructor, architect and – when applicable – engineers) are jointly and severally liable.

As such, the owner of a building who has suffered damage as a result of defective design or construction of the building can start a legal action against any of the construction professionals and the developer, or against all of them when it is not possible to determine who is liable for the damages *ex ante*.

vii Accountants and auditors

Article 26.1 of Law 22/2015 of 20 July on Account Auditing states that ‘auditors of accounts and audit firms shall be liable for damages resulting from non-compliance with their obligations under the general rules of the Civil Code, with the particularities established in the aforementioned article’.

As regards the specific provisions applicable to accountants and auditors, Law 22/2015 sets forth the following:

- a* The civil liability of auditors and audit firms is proportional and directly corresponds to the economic damage caused to both the audited entity and third parties by their professional performance. For these purposes, a third party means any physical or legal person, public or private, that proves that they acted or failed to act on the basis of the audit report and this was an essential and appropriate factor for them to take into account in giving their consent, to motivate their actions or take their decisions.
- b* A civil liability action should be brought against each individual separately and as a distinct issue from the damage or injury caused by the audited entity itself or by third parties.
- c* When the audit is carried out by an auditor on behalf of an audit firm, the auditor who has signed the audit report and the audit firm are jointly and severally liable, subject to the limits indicated in the preceding section.

The civil liability of auditors can, in turn, be of two types: contractual and non-contractual.

A legal action for the contractual liability of an auditor or audit firm is subject to a four-year limitation period beginning on the date of the audit report. Non-contractual liability claimed by third parties who relied on the auditor's report is subject to the general one-year limitation period applicable to non-contractual liability.

viii Insurance professionals

Insurance professionals who advise insured parties and represent them before the insurer (insurance mediators) are civilly liable to their clients (the insured party) if they fail to fulfil the obligations and standards of care set out in the sector regulations, in particular, in Law 26/2006 of 17 July on Private Insurance and Reinsurance Mediation.

Insurance mediators must (1) provide independent, impartial and informed advice to clients on risk coverage; (2) appropriately manage the funds provided by the client to contract insurance coverage and pay premiums; and (3) assist clients in the event of a loss or incident, providing them with the necessary information as to the scope of the coverage and the steps to be taken in relation to the insurer and taking them directly on behalf of their clients.

Insurance mediators must have an insurance policy to cover their potential civil liability for professional negligence.

III YEAR IN REVIEW

Banking and financial professionals' civil liability has been the origin of most of the myriad of cases brought by consumers before the civil courts in Spain during 2017. Although the defendant is normally the financial entity or bank and not the professionals who work for them, the legal basis for the compensation sought by clients is, as a general rule, the negligent performance of those professionals.

The Spanish Supreme Court issued an important decision in November 2017 concerning the civil liability of a lawyer who failed to submit a collective redundancy petition within the statutory term. As a consequence of his negligent performance, the client was obliged to pay its employees an additional compensation, which it would not have had to pay otherwise (i.e., if the collective redundancy petition had been filed with the authorities in due time). The Court concluded that the analysis of causation could be based on the fact that the collective redundancy petition would reasonably have been accepted (i.e., it now seems that a reasonability test is sufficient to find causation between the lack of diligence of lawyers and the damaging result for their clients).

IV OUTLOOK AND FUTURE DEVELOPMENTS

Professionals' liability has developed considerably in Spain in recent years. Construction professionals are facing an increasing numbers of claims as a result of the construction boom in Spain in the past decade. The number of construction liability cases should decrease in the coming year as a result of the entry into force in 2007 of a new Construction Technical Code, which imposed improved technical specifications and requirements for all constructions.

Litigation against banking and finance professionals will continue to grow in the coming years as a result of the financial loss suffered by many financial services clients as a result of the crisis. However, as mentioned above, this litigation will be directed against the financial entity itself and not its employees or individual professionals.

SWEDEN

*Johannes Ericson and Carl Rother-Schirren*¹

I INTRODUCTION

i Legal framework

Negligent acts or omissions conducted by a professional may give rise to various sanctions, including criminal charges and disciplinary actions, but this article mainly addresses the remedy of damages.

To establish professional liability, the aggrieved party essentially needs to establish that it has incurred financial loss (including the quantum of the loss) because of the professional's breach of his or her duty of care (negligence), that the breach was the cause of the loss (causation) and that the cause was adequate (to a certain extent foreseeable and within reasonable remoteness). Only the negligence test will be briefly described in this Section although all the requirements are indeed interesting and complex.

The standard of negligence is fairly high under Swedish law; a substantial breach of the professional's duty of care is typically required, although an adviser is also under a fairly strict standard of care regarding his or her obligation to inform a client of risks associated with matters on which advice is provided.

Many professions are subject to statutory regulation: inter alia, financial advice to consumers, insurance brokering, real estate brokering and auditing. These statutes typically stipulate general principles and rules that the relevant professionals must adhere to. These principles are in turn set out in more detail in various sources, many of which are traditionally considered 'soft law'. Examples of these sources include recommendations from business organisations, agreements between such organisations and authorities, guidelines provided by relevant authorities and precedents set by courts and by non-judicial policymakers (e.g., disciplinary committees). Where a professional has acted in breach of the norms intended to safeguard the interests of a client, there is generally a presumption for negligence.

Also, a test similar to the common law Learned Hand formula is commonly applied for establishing negligence. This test is of particular use and importance where there has been no breach of a relevant norm. In essence, the following four factors are assessed in this test:

- a* the probability that loss will be incurred;
- b* the gravity of the loss;
- c* the foreseeability of the loss; and
- d* the options for preventing the loss.

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In a situation where there has been a high probability of major loss and the risk for the loss has been simple to foresee and could have easily been avoided, the professional would probably be considered negligent.

A professional's liability is often limited through limitation of liability clauses or monetary caps in the parties' agreement or through caveats made. Contractual limitations of liability are generally upheld by Swedish courts and arbitral tribunals. Exceptions are, however, possible where a provision is deemed unconscionable in accordance with Section 36 of the Swedish Contracts Act, having regard to the contents of the agreement, the circumstances prevailing when the agreement was entered into, subsequent circumstances and other circumstances in general.

Where the party in breach is an individual who has provided his or her services under employment, any claim would typically be directed against the employer under the Swedish legal principle on the principal's liability.

Defences to professional liability claims are in general the same as those to any liability claim (i.e., objections as to negligence, the existence and quantum of loss, causation and adequacy, contributory negligence or the aggrieved party's failure to mitigate its loss). It is typically the aggrieved party that has the burden of proof for the circumstances resulting in liability, although it can fall to the party in breach under certain conditions; for instance, when the professional has omitted to document the advice rendered.

ii Limitation and prescription

The general statutory time limitation for monetary claims is 10 years. This applies for most claims relating to professional negligence, with the result that no claim may be brought after 10 years from its 'occurrence' (a point in time that can be complex to establish but is typically when the alleged negligent act was committed) unless the period of limitation is interrupted prior thereto. The period of limitation is interrupted by any of the following events: (1) the debtor offers payment, makes payment of interest or principal amount, or otherwise acknowledges the claim of the creditor; (2) the debtor receives from the creditor a demand in writing or other written reminder in respect of the debt; or (3) the creditor commences legal proceedings or otherwise pleads the claim against the debtor in any court, before the Swedish Enforcement Authority, in arbitration proceedings, bankruptcy or insolvent liquidation proceedings, or in negotiations in respect of judicial composition in an insolvency procedure.

An exception is made where the professional is deemed a trustee. A trustee may be defined as anyone who is tasked by a principal to perform a legal act on the principal's behalf or represent the principal in relation to authorities. Claims against a trustee must be made by commencing legal proceedings within a year. However, as most professionals that provide advice are not deemed trustees, this exception to the 10-year main rule is, in practice, of limited significance.

In addition to the above, a claim may be time-barred or precluded if the aggrieved party has failed to provide the professional with a valid notice of its claim in due time. A valid notice requires that the aggrieved party make clear to the professional that the services provided were deficient (i.e., not of an acceptable standard) and that the professional is or will be held liable. Certain aspects of the time-bar issue are currently uncertain under Swedish law, but clarifications may be expected from the Swedish Supreme Court during 2019 (see Section IV).

iii Dispute fora and resolution

Professional liability claims may be subject to litigation and arbitration. Litigation is governed by the Swedish Code of Judicial Procedure and as a general rule the domicile of the defendant decides which court is competent in a particular case. A company (and similar entities) is domiciled where it has its registered office.

Arbitration is the favoured method of dispute resolution where the subject matter has been agreed upon, and many professionals provide for arbitration in their standard terms and conditions. Arbitration clauses are upheld by Swedish courts unless deemed unconscionable in accordance with Section 36 of the Contracts Act, which essentially never applies in commercial contexts. Arbitration is most commonly conducted under institutionalised arbitration rules, primarily the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and secondarily the Rules of Arbitration of the International Chamber of Commerce.

Alternative dispute resolution (ADR) proceedings such as mediation are also available. ADR has gained some popularity over the past decade but is not frequently applied.

iv Remedies and loss

Several remedies are available to the claimant if professional liability applies. The claimant may, under certain conditions, demand that the professional perform the agreed service adequately or demand a reduction in price. For practical reasons, however, damages are virtually exclusive as the means of remedy. As a starting point and in the absence of an agreement on how to calculate damages, the aggrieved party is entitled to its actual loss incurred and nothing more. The 'doctrine of difference' is the primary tool in calculating the amount of damages that the aggrieved party is entitled to. According to this principle, the liable party is obliged to pay damages in the amount that puts the aggrieved party in the hypothetical position where it would have been had the negligent act not been performed (i.e., the aggrieved party is entitled to full financial compensation, including loss of profit). In other words, the aim of the calculation is to put the aggrieved party in the situation that it would have been in had the professional provided the services in accordance with the agreement or standard of care.

A professional's liability to pay damages is limited to the immediately aggrieved party; a professional can as a general rule (with a few exceptions, such as real property valuations and professional advice rendered in bad faith) not be liable to pay damages to a third party, (i.e., anyone who incurs financial loss as a result of the aggrieved party's loss). In addition, the compensation to the aggrieved parties may be reduced with reference to, for example, contributory negligence or failure to mitigate loss.

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Sweden are not governed by any specific regulations. However, lawyers who hold the title *advokat* (i.e., members of the Swedish Bar Association) do, as does any lawyer working under an *advokat's* supervision. The Code of Judicial Procedure states that an *advokat* must observe 'good mores'. Essentially, this means that an *advokat* is bound by the Swedish Bar Association's Code of Conduct, which serves as a framework for various ethical norms that an *advokat* and his or her employees must adhere to. The obligations of an *advokat* are further specified in precedents from the disciplinary committee of the Swedish Bar Association, as

well as declarative statements by the board of the Swedish Bar Association. The Code of Conduct contains disciplinary actions only; there are no provisions on remedies available to an aggrieved client. An *advokat* must carry liability insurance.

ii Medical practitioners

Various statutes regulate medical practitioners. It follows from the Swedish Security of Patients Act that all medical practitioners are under an obligation to ensure they provide their services in accordance with proven experience and science. Any medical practitioners who do not comply with these requirements may lose their licence or be subject to criminal proceedings and be held liable for damages. All medical practitioners come under the supervision of the Swedish Health and Social Care Inspectorate. A medical professional is not obligated to carry liability insurance, but anyone who provides medical services must have insurance for patient injuries, according to the Swedish Patient Injury Act.

iii Banking and finance professionals

Banking and finance professionals who provide financial advice to consumers regarding investment of the consumers' assets in financial instruments or in life assurance with an element of capitalisation are governed by the Swedish Financial Advice to Consumers Act. Professionals are required to have sufficient skills and observe generally accepted practices. Furthermore, the statute provides that a consumer is entitled to damages for pure financial loss and contains a notification provision that the consumer must adhere to.

iv Computer and information technology professionals

Computer and information technology professionals are not specifically regulated in Swedish law.

v Real property surveyors

Real property surveying may be provided either by Lantmäteriet, the Swedish authority responsible for property division, or by professionals in the private sector. However, legally binding property divisions may only be based on surveying provided by Lantmäteriet. Professionals engaged in the private sector are not regulated specifically under Swedish law.

vi Construction professionals

Construction professionals are not specifically regulated in Swedish law. However, there are standard agreements that regulate the conditions of liability for construction services. These agreements are frequently applied on the market and may serve as a source of general principles and commercial usage in resolving issues of liability, even where the parties have not agreed to apply the agreements. The general principle of due care that the parties must exercise under the agreements is known as the standard of professionalism, although the agreements also impose strict liability in certain situations.

vii Accountants and auditors

Under Swedish law, auditors and accountants are regulated by the Swedish Public Accountants Act, which stipulates general principles auditors must adhere to. Detailed regulation is provided by FAR (a Swedish trade organisation for auditors and accountants), mainly in the form of an adapted version of the International Standards on Auditing, and precedents

established in disciplinary matters addressed by the Swedish Inspectorate of Auditors. Auditors and accountants must carry liability insurance, unless the Inspectorate of Auditors has granted an exemption. Consultancy services (such as tax advice) provided by accountants and auditors are not specifically regulated under Swedish law.

viii Insurance professionals

Insurance brokers are regulated by the Swedish Insurance Mediation Act. Generally, insurance brokering may only be conducted under a licence from the Swedish Financial Supervisory Authority. A licence is only granted where the broker meets certain criteria (including possession of appropriate knowledge and skills for the business to be conducted) and holds liability insurance.

An insurance broker must observe 'good insurance brokering practice' and attend to the client's interests with due care. What constitutes good practice follows primarily from soft-law sources. The regulations and general guidelines issued by the Financial Supervisory Authority are a source of particular importance.

III YEAR IN REVIEW

i Introduction

There is no significant recent legislation concerning or affecting professional negligence. As expected, however, the previous year saw a significant activity in Swedish courts in matters regarding professional negligence. We present below a few cases of particular importance.

ii The Havsbrisen case²

Briefly, the circumstances were the following. A lawyer, who is a member of the Swedish Bar Association and works for a reputable law firm, had acted for a client in unsuccessful construction litigation proceedings. The (former) client brought a claim against its former counsel's law firm, alleging that the lawyer had negligently failed to identify a legal argument based on a construction contract and that the lawyer's negligence had resulted in the client losing a potential remedy (and incurring loss as a result thereof). The law firm contested the claim and argued, inter alia, that the legal argument would not have been successful and that the lawyer had not been negligent.

The Supreme Court held that whether a lawyer has been negligent is dependent on the circumstances of each particular case. Circumstances relevant for this assessment includes the scope of the assignment, the complexity of the factual and legal issues, time constraints, the amounts at stake, the client's instructions and the lawyer's particular experience within the relevant area of law.

As a starting point, a lawyer may be deemed negligent when an obvious error has been made, for example, if the lawyer's advice is in clear contradiction with legislation or established case law, provided that the legal issue is simple. So may also be the case if the lawyer neglects to invoke easily accessible evidence or neglects to observe deadlines.

When the legal issue is complex, it must primarily be assessed whether the lawyer has been reasonably diligent in his or her assessment of the factual, legal and procedural circumstances relevant to the case. The lawyer is obligated to inform the client of the options

2 Case No. T 12-17, 13 June 2018, referred to as '*Advokatens skadeståndsansvar*' by the Supreme Court.

available, and the strengths and weaknesses thereof, yielded by this assessment. A failure to do so, however, only constitutes negligence in obvious instances. As regards litigation, the Supreme Court noted that a lawyer can only, in cases of poor performance, be deemed negligent in exceptional cases. This can typically only be the case when the lawyer has erroneously conceded a fact, neglected to invoke a circumstance of immediate importance to the client's position or neglected to raise an objection that ought to have been presented.

The Supreme Court concluded that the lawyer in question had been engaged by his client because of his particular experience within the relevant field of law. Furthermore, the parties had had several meetings wherein the relevant documentation, in particular the construction contract, had been discussed. Lastly, a number of contracts had been relevant when the lawyer had assessed his client's case, enabling a variety of alternatives for the client to pursue its construction claim. The Supreme Court held that the lawyer had not adequately presented the available options to his client and, therefore, questioned whether the lawyer had been reasonably diligent in analysing his client's case. However, the Supreme Court held that the extent of the potential error did not constitute negligence. The Supreme Court, *inter alia*, seems to have taken into consideration that the lawyer had not been provided with all possibly relevant documentation, despite having inquired after this documentation a number of times. The claim was, therefore, dismissed.

The Supreme Court's reasoning in *Havsbrisen* has been subject to some debate, in particular whether it is a requirement that an obvious error has been made (regardless of the complexity of the legal issue) for a lawyer to be deemed negligent. It has also been argued that the threshold for negligence to be met seems to be higher for lawyers' negligence, in comparison to auditors' negligence. However, as outlined further below, clarifications in this regard may be expected from the Supreme Court this year.

As a side note, the law firm had in addition argued that the client had failed to put the law firm on notice in due time (i.e., not within the notice period). When the notice period begins and the length thereof are open issues under Swedish law and it was expected that the Supreme Court would address these issues in *Havsbrisen*. No such ruling was provided, however, since the Supreme Court dismissed the claim with reference only to the lawyer not having been negligent.

iii The Kraft & Kultur case³

In essence, the circumstances were the following. The Swedish company Kraft & Kultur's annual reports had been manipulated for the financial years of 2003–2010. The annual reports showed that the company had been profitable, contrary to what was actually the case. Believing the company to be profitable, its parent company undertook various measures, including injecting capital into Kraft & Kultur. Once it turned out that Kraft & Kultur had in fact not been profitable, its parent company incurred losses allegedly exceeding 1 billion Swedish kronor. The parent company brought a claim against Kraft & Kultur's auditor (and the auditor's firm), alleging that the auditor had been negligent in its auditing, which had led to the company's losses not being discovered and thereby causing the parent company's loss. The auditor brought a recovery claim against the former board member, alleging that the board members were liable for any established loss. The claim against the auditor was dismissed by the Stockholm District Court, which held that the auditor had

3 Case No. T 7073-16, 28 September 2018.

not been negligent (which resulted in the recovery claim against the former board members being ‘automatically’ dismissed). The claim was appealed to the Svea Court of Appeal, which delivered its ruling on 28 September 2018.

The Svea Court of Appeal held that an auditor is permitted to rely on statements made by the company unless the audit carried out indicates that the information is incorrect. The court also held that the auditor had not adequately possessed the particular knowledge and insight in the kind of business that Kraft & Kultur was involved in and that the auditor had not possessed adequate knowledge of Kraft & Kultur’s IT and invoicing systems. It was deemed crucial that the auditor should have requested more information and conducted a more thorough review following which she would have realised that certain key information provided by management had not been extracted from the company’s systems but was in fact manipulated. Because of this and a number of other reasons related to each particular financial year, the court held, contrary to the district court, that the auditor had been negligent when auditing Kraft & Kultur.

The parent company further had to prove causation between the negligent audit and its alleged loss. The parent company argued that it would not have made the capital injections into Kraft & Kultur had the audit been carried out with due care (entailing that the parent company would have learned about the manipulations of the accounts). The court held, however, that the parent company’s decisions to inject capital was based on the apprehension that Kraft & Kultur had a very good business idea and a bright future, rather than short-term profit, and that a hypothetical discovery of the manipulations in 2004 would not have affected the parent company’s willingness to make capital injections. In this context, the court also noted that there were certain long-term fixed price agreements and guarantees that also would have given reason for the parent company to make the capital injections even if the annual reports for the relevant years had correctly shown that Kraft & Kultur was not profitable. The court, therefore, held that causation did not apply for the years 2004–2006.

Regarding the following years, the court decided to begin with an assessment of the parent company’s calculation of its alleged loss. The auditor argued that only capital injections that had been used by Kraft & Kultur to cover losses stemming from electricity trading were relevant for the loss assessment. This was accepted by the court, which held that only such capital injections could be causally connected to the auditor’s negligence. The parent company had made a number of capital injections into Kraft & Kultur but had failed to specify to what extent the capital injections were made in order to cover the trading losses. Based on this as well as other deficiencies in the calculation, the court held that even a basic and essential condition for the loss calculation was not fulfilled. The court further held that the calculation was so flawed that it was not possible to make a comparison between the hypothetical scenario (i.e., where the annual reports had correctly shown that Kraft & Kultur was not profitable) and the actual course of events. The claim was, therefore, dismissed.

iv The HQ case

The *HQ* case was one of Sweden’s largest and most spectacular commercial litigation proceedings ever. The claimant’s claim for damages amounted to approximately 3.2 billion kronor. The claim was almost fully rejected by the Stockholm District Court in December 2017. Both the claimant and the defendants (of which there were several) had been granted leave to appeal by the Svea Court of Appeal. However, the dispute was settled before proceedings in the Court of Appeal could be initiated.

IV OUTLOOK AND FUTURE DEVELOPMENTS

i General observations

We expect to see a continued increase in professional negligence claims in the Swedish market during the next few years. Over the past decade, there have been a number of major claims brought before Swedish courts, including *Prosolvia*, the above-mentioned *HQ* and *Kraft & Kultur*. A few claims have been successful, resulting in auditors, board members and other professionals being held liable for, in some cases, substantial damages. These claims may result in an increased willingness to litigate among aggrieved parties and their insurers, based on the risk–reward test. In our view, the number of large claims against auditors and board members may increase, but we also expect a general increase in claims against legal and financial advisers, especially in relation to M&A transactions.

The Swedish economy has had a long boom, arguably in part because of low interest rates, after having made a rather swift recovery from the credit crunch. The finance and construction sectors have been blooming and the real estate market in Stockholm has seen increased prices and extensive production. There are, however, concerns in the real estate market, as prices have been decreasing since the autumn of 2017 and well-known real estate companies have found themselves in financial difficulties. Since 2018, a few major real estate companies have ended up in financial distress, and we believe that more are to follow. Extensive production, falling prices and distressed companies are all factors leading us to believe that the real estate sector is likely to produce professional negligence claims in the years to come.

The transaction market is also a potential source of future disputes. There have been a few years of intensive IPO activity, but this has yet to result in any major public professional negligence claims similar to the *Danish OW Bunker* case. We still see a strong market for private M&A deals, and this is likely to result in further post-M&A disputes concerning the professionals involved.

In summary, the general willingness to litigate professional negligence claims in combination with an expected recession is likely to result in such claims also being made in the years to come.

ii Landmark cases of 2019

As for cases coming up in 2019, there is one in particular that has attracted attention in the market; a case concerning a tax lawyer at a reputable Swedish law firm.⁴ The Supreme Court has granted leave to appeal (the claim was rejected by the district court but successfully appealed in the Court of Appeal). In short, the relevant circumstances are the following. An association sold several apartment buildings in 2004. In 2006, the association retained the tax lawyer to assess several details of the transactions and issues regarding taxation. Subsequent to the lawyer's advice, the Swedish Tax Agency imposed a tax penalty on the association amounting to roughly 67 million Swedish kronor.

The association filed a claim for damages corresponding to the tax penalty plus interest, arguing that the lawyer's advice had caused the tax penalty. The law firm contested the claim, arguing, *inter alia*, that the lawyer has not been negligent and that the association failed to

⁴ Case No. T 2841-18.

put the law firm on notice within the notice period. The case concerns a number of legal issues that the Supreme Court may address, for example, the standard of negligence and the applicable notice period as described below.

The standard of negligence

The standard of negligence is fairly high under Swedish law; a substantial breach of the adviser's duty of care is typically required, although an adviser is also under a fairly strict standard of care regarding the obligation to inform a client of risks associated with matters on which advice is provided. The Supreme Court may, therefore, provide further guidance on the negligence test to be applied, as there remain uncertainties despite the recent ruling in the *Hausbrisen* case.

The duty of notification

As explained above, a claim may be time-barred or precluded under Swedish law if the aggrieved party has failed to provide the adviser with a notice of its claim in due time (the notice period), unless agreed otherwise.⁵ We have seen an increase in claims being contested with reference to the notice period having been exceeded. However, when the notice period begins and the length thereof are open issues under Swedish law. Depending on the outcome of this case, the Supreme Court may be expected to resolve these issues.

Based on the opinions of leading scholars as expressed in legal literature, we believe that the answers would currently be as follows:

- a* the notice period begins when the aggrieved party has realised, or ought to have realised, that its counterparty is in breach of contract, that is, the aggrieved party must not only have reasons to believe that it has incurred financial loss; it must also have reasons to believe that a breach of contract is the cause thereof. However, it has also been argued that the notice period begins when the aggrieved party has realised (i.e., possesses actual knowledge of) that there has been a breach of contract; and
- b* the notice should be made within a reasonable time and the notice period varies according to the specific circumstances at hand but is normally around six months.

The Supreme Court's ruling in the 'tax lawyer case' is expected during the first half of 2019.

⁵ As explained above, a valid notice requires that the aggrieved party clearly specifies to the professional that the services provided were deficient (i.e., not of an acceptable standard) and that the professional is held liable for loss.

SWITZERLAND

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I 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 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, the rights and duties of the contractual parties of a service agreement are mainly governed by the legal provisions of agency law. To the extent that the law does not provide for specific duties in relation to specific services, the 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, the law provides a number of basic provisions, which are mandatory. Based on the jurisprudence of the Swiss Federal Supreme Court, the principle duties of care and loyalty⁴ are mandatory and cannot be waived by contract.⁵

Article 398 Paragraph 2 CO provides that the agent owes the principal the loyal and careful performance of the mandate.

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2 Fellmann, Walter and Kottmann, Andrea: *Swiss Liability Law*, Volume I, General Section as well as liability for fault and personality infringements, ordinary causal liability of the CO, CC and Product Liability Act (Berne 2012), paragraph 10.

3 Article 394 Paragraph 1 CO.

4 Article 398 CO.

5 Basel commentary on the CO from Weber, Article 394, No. 21; Basel commentary on the CO from Weber, Article 398, No. 34.

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 PC. The duty of care is considered to further specify the duty of loyalty. With the exception of the reference to the duty of care of the employee in employment law,⁶ the duty of care is, however, not explicitly referred to in statutory law, and its scope has been defined by the jurisprudence of the Swiss 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

In 1989, the Federal Supreme Court again confirmed that 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 CO in connection with Article 398 Paragraph 2 CO. Three fundamental elements are of relevance. The first element is a violation of contractual duties, respectively 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 not a required element of contractual liability, and, if the three other elements can be affirmed, culpability is assumed. The agent can, however, avoid liability by exculpating himself or herself if he or she proves 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 the legal possibility of enforcement.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. In the event that the debtor

6 Article 321(e) Paragraph 2 CO.

7 Basel commentary on the CO from Weber, Article 398, No. 24; Huguenin, Claire: *Swiss Code of Obligations – General and Special Section* (Second Edition. Zurich/Basel/Geneva 2012), paragraph 3266.

8 Swiss Federal Supreme Court decision 127 III 357 No. 1c.

9 Swiss Federal Supreme Court decision 115 II 62, 64 f.; Fellmann: 'Walter, Objectification of due diligence in contract law', *HAVE*, 2016, page 95; Müller, Thomas: 'The liability of the lawyer – selected aspects', *Anwaltspraxis*, 2015, page 461.

10 Fellmann, 2016, page 98 f.

11 Huguenin, paragraph 2220; Fellmann and Kottmann, paragraph 3027.

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 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 The general rule for claims in tort is that they become time-barred one year after the damage and the identity of the person causing the damage become known. This ‘relative’ statute of limitations is provided for in Article 60 Paragraph 1 CO. Irrespective of the relative statute of limitation, claims in tort become time-barred 10 years after the act that triggered liability. One exception to these general principles is provided for in Article 60 Paragraph 2 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 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 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 Swiss Federal Supreme Court, the Supreme Court Law (SCL).

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 determined by 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 Swiss francs.¹⁷

Certain cantons, such as Zurich, which are of particular importance for the Swiss economy, have specialist commercial courts. These commercial courts deal with commercial

12 Article 142 CO.

13 Article 127 CO.

14 Article 128 CO.

15 Article 137 Paragraph 1 CO.

16 Article 122 Paragraph 2 of the Swiss Constitution and Article 3 CPC.

17 Article 243 et seq. CPC.

litigation between corporate entities. Individuals acting as plaintiffs can choose 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 professionals from the insurance industry.

The district courts are the courts of first instance for all disputes except for those that are brought before the commercial courts. Prior to filing the claim with the district 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 futile exercise 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 CCP, the parties can mutually agree to go directly to court if the amount in dispute exceeds 100,000 Swiss 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 which hears appeals against the decisions of the district courts. The judgments of the cantonal superior courts are then subject to an appeal to the Swiss Federal Supreme Court if the amount in dispute exceeds 30,000 Swiss francs.¹⁸

iv Remedies and loss

As mentioned above, the statutory basis for most claims resulting from professional negligence is agency law. 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 (Article 107 et seq. CO). In general, both the agent and the principal by law have the right to at any time terminate the agency relationship. According to legal literature and the jurisprudence of the Swiss 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 element of trust has – for whatever reason – ceased to exist.¹⁹

The right of termination does not apply if, due to 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 due to the negligence of the agent, the agent may also be liable for damage caused due to the termination of the legal relationship as such.²⁰

In addition to his or her claim for performance and damages, the principal can assert his or her right pursuant to Article 400 CO to require the agent to report to the principal. The principal can also demand that the agent return everything he or she has received from

18 Article 74 Paragraph 1 SCL.

19 Swiss Federal Supreme Court decision 115 II 464 No. 2a.

20 Swiss Federal Supreme Court decision 110 II 380 No. 3.

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.²¹

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 the agent properly performed his or her duties for the benefit of the principal. In the event that the work product is, due to the negligence of the agent, without any value to the principal, the agent forfeits the entire fee.²²

According to the jurisprudence of the Swiss 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 of liabilities. Damage can also include a loss of profits. The Swiss 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.²³ There are two manners in which the hypothetical value of the net assets can be determined. 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 in the event that 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).²⁴ This can pose difficulties in determining the hypothetical net asset value resulting from correct performance.²⁵ 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.

Article 8 of the fundamental introductory provisions of the Swiss Civil Code provides that, in the absence of a statutory provision to the contrary, the party asserting a right has the onus of proving the factual basis of its claim. The claimant is also required to substantiate the factual basis of his or her claim and to submit evidence in support of his or her statements of facts.²⁶ The principal asserting claims for damages against the service provider is, therefore, required to substantiate and prove (1) the violation of duties, (2) the amount of damages and (3) the causal connection between the violation of duties and the damages incurred.²⁷ On the other hand, the agent can refute the claim by asserting and proving facts that create doubt in the judge's mind.²⁸

21 Article 400 CO; Swiss Federal Supreme Court decision 139 III 49 No. 4.1.2; Swiss Federal Supreme Court decision No. 122 IV 322 3c/aa.

22 Swiss Federal Supreme Court decision 124 III 423, Pra 88 (1999) No. 22.

23 Swiss Federal Supreme Court decision 104 II 198 No. a; Swiss Federal Supreme Court decision 127 II 403 No. 4a; Fellmann, Walter: *Attorneys at Law* (Second Edition, Berne 2017), paragraph 1458.

24 Article 97 CO in connection with Article 398 Paragraph 2 CO.

25 Fellmann, 2017, paragraph 1458 f.

26 Article 55 CC.

27 Swiss Federal Supreme Court decision 128 III 271 No. 2a/aa; Swiss Federal Supreme Court decision 115 Ib 175 No. 2b.

28 Landolt, Hardy: 'Facilitation of evidence and reversal of the burden of proof in medical malpractice proceedings', Fellmann, Walter/Weber, Stephan (ed.), *Liability Litigation* 2011, Substantiation, Evidence,

II 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 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 in order 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 the Conduct within the Legal Profession (BGFA) simply states that the lawyer is required to dutifully and carefully provide services to the principal.²⁹

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 with which he or she has no or little 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 is no conflict of interests and that he or she can exercise the mandate independently. In a second phase, he or she is required to obtain the instructions needed to properly perform his or her duties. This is frequently a task that is 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 in order 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 properly perform the analysis. The lawyer is then required to properly report 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. It can, therefore, be said that a lawyer needs to comply with a high standard of care.³⁰

Facilitation of Evidence, Trial against Several, Free Administration of Justice and Legal Protection Insurance, Contributions to the Conference of 24 May 2011 (Zurich/Basel/Geneva 2011), page 83.

29 Article 12 lit. (a) BGFA.

30 Fellmann, 2017, paragraph 1498 ff.; Müller, page 462 f.; Huguenin, paragraph 3267; Schiller, Kaspar and Nater, Hans: 'The professional due diligence obligations of lawyers under Art. 12 lit. a BGFA do not go beyond the contractual obligations', *SJZ*, 2019, page 43; Schmid, Markus: 'The attorney's duties of care – a selection', *HAVE*, 2016, page 101..

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 most frequent cases in which lawyers are held liable in Switzerland are care cases. Missing a statutory or court-ordered deadline is considered a violation of the duty of care almost irrespective of the reason.³¹ 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, while 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 the lawyer is 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, to a lesser extent, applies 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 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 due to the incorrect application of the law in contractual or corporate work is higher, as such mistakes are generally easier to prove.

Lawyers licensed to practise in Switzerland are required to maintain a professional liability insurance with a minimal coverage of 1 million Swiss francs.³² In practice, large law firms have a 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 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. CO. On the other hand, the relationship between medical practitioners, respectively hospitals, and their patients are governed by cantonal public law. Therefore, the basic principles applicable to agents also apply to medical practitioners in private practice. With respect to negligence and liability, the respective 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.

31 Swiss Federal Supreme Court decision 87 II 364.

32 Article 12 lit. f BGFA.

The primary duty according to Article 40 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 Swiss Federal Supreme Court has held that doctors are required to exercise the same degree of care even when treating patients outside of their practice or hospital either as a favour or in the case of an emergency.³³ The required degree of care is determined based primarily on objective criteria. The standard of care is higher for specialists practicing 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 associate with this treatment or operation, the timely urgency and the available infrastructure are of the essence.³⁴ Although a hospital or a doctor, therefore, in general 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.³⁵

The duty to correctly and completely inform the patient of the risk of a treatment is of fundamental importance. According to the Swiss Federal Supreme Court, an operation qualifies as a bodily injury. With the exception of emergencies, the consent of the patient is, therefore, required.³⁶ This consent can only be given based on a correct disclosure of the benefits, risks and possible alternative treatments.³⁷ The agent's duty to account for his or her activities³⁸ 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).³⁹

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 (Federal Law on Banks and Savings Banks, Anti Money Laundering Law and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading to only name a few) also apply. 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

33 Swiss Federal Supreme Court decision 115 Ib 175 No. 2b; Landolt, Hardy and Herzog-Zwitter, Iris: 'Physicians' duty of care', *HAVE*, 2016, page 112.

34 Swiss Federal Supreme Court decision 133 III 121 No. 3.1; Huguenin, paragraph 3268; Landolt and Herzog-Zwitter, page 112.

35 Swiss Federal Supreme Court decision 113 II 429 No. 3a; Landolt and Herzog-Zwitter, page 112.

36 Swiss Federal Supreme Court decision 124 IV 258 No. 2; Ott, Werner E: 'Medical and legal clarification of medical liability cases', *HAVE*, 2003, page 282.

37 Swiss Federal Supreme Court decision 113 Ib 420, No. 4; Ott, page 282.

38 Article 400 CO.

39 Swiss Federal Supreme Court decision 117 Ib 197 No. 5; Basel commentary on the CO from Weber, Article 398, No. 29; Huguenin, paragraph 3270; Ott, page 282.

Act) are expected to enter 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 high in the financial industry. 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 verifying signatures and the identity of the customer in the context of transfer and investment instructions.

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 is not only 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 PC, which applies also in cases of *dolus eventualis*. A violation of Article 305 *ter* PC is possible in cases in which the financial service provider negligently failed to exercise due care in ascertaining the identity of the beneficial owner of the assets concerned. The Swiss 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.⁴⁰ 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 IT sector. These professions are not regulated in Switzerland. The general rules set out in the introductory section, therefore, apply.

v Real property surveyors

The same applies with respect to real property surveyors. A private association of 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.

40 Swiss Federal Supreme Court decision 130 IV 58 No. 8.4; Roth, Monika: 'On the due diligence of financial service providers', *HAVE*, 2016, page 114.

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 as 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, the distinction is, however, not relevant. They are equivalent. The SIA-Rules 102 and 103 of 2014 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 102 and 103 required to apply the current art of construction, as well as generally accepted current rules of building and construction.⁴¹ An architect is further, in accordance with Article 2.1 and 3.4.1 of the SIA-Rules 102 2014 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 Swiss Federal Supreme Court has held that an architect can also become liable for mistakes made in the calculation of costs.⁴²

The liability of engineers and architects is governed by Article 97 Paragraph 1 CO combined with Article 398 Paragraph 2 CO (agency), respectively Article 364 Paragraph 1 CO (works contract).

In general, architects and engineers voluntarily conclude a 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 396 et seq. 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 Swiss Federal Supreme Court has held that accountants are liable for an exact and complete accounting.⁴³

Auditors are more strictly regulated by the Federal Law on the Admission and Supervision of Auditors (RAG). Special rules apply to the auditors of financial institutions. A special regulatory authority exists.

The general liability of auditors is governed by Article 755 CO. The auditor is liable for all damage caused intentionally or negligently.⁴⁴ 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.

41 Hochstrasser, Michael and Denzler, Beat: 'The planner's duty of care', *HAVE*, 2016, page 116.

42 Swiss Federal Supreme Court decision 134 III 361 No. 6.2; Swiss Federal Supreme Court decision 4A_271/2013 from 26 September 2013 No. 2.1; Basel commentary on the CO from Weber, Article 398, No. 29.

43 Swiss Federal Supreme Court decision 4A_601/2012 from 14 October 2013 No. 3; Basel commentary on the CO from Weber, Article 398, No. 29.

44 Böckli, Peter: Swiss Stock Corporation Law with Merger Act, Stock Exchange Company Law, Group Law, Corporate Governance, Auditor's Law and the Audit of Financial Statements in new version – taking into account the ongoing revision of Stock Corporation and Accounting Law (Fourth edition, Zürich/Basel/ Geneva 2009), page 2413.

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 CO, the annual general assembly, which is required to approve of 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.⁴⁵

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 the 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.

III YEAR IN REVIEW

The most notable developments in 2018 have been the development of the legislation applicable to the provision of financial services (see Section II.iii). The law applicable to limitation and prescription has also been amended, and the new rules will enter into effect on 1 January 2020. These amendments will not, however, have a major impact on professional liability.

IV OUTLOOK AND FUTURE DEVELOPMENTS

The Swiss 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.⁴⁶ Also, professionals in various industries have been organising themselves in professional associations and will continue to do so. These will on their part further develop professional standards, which will become the standard in the respective industry 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 following years.

45 Article 9 Paragraph 1 lit. c RAG.

46 Fellmann, 2016, page 96.

UNITED ARAB EMIRATES

Michael Kortbawi and Adam Tighe¹

I INTRODUCTION

i Legal framework

Article 383 of Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (the Civil Code) states:

(1) if that which is required of an obligor is . . . the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary. (2) In all cases, the obligor shall remain liable for any fraud or gross negligence on his part.

This Article is the cornerstone for claims for professional negligence in the United Arab Emirates (UAE). Gross negligence is not defined in the Civil Code; however, the wording above indicates that if the conduct is beyond what a reasonable person would exercise, there is argument that it may constitute gross negligence.

Under DIFC² Law, tortious liability requires the following elements to be satisfied:

- a* the party at fault owed the party who suffered loss a duty of care;
- b* the party at fault breached the duty of care owed; and
- c* damage arose as a result of the breach of the duty (causation).

Further, the principle of remoteness is determinative in establishing whether the damage was foreseeable. If the damage is considered too remote, the third limb of negligence will not be satisfied.

The above elements (in the DIFC law) are not as well settled in onshore UAE arising from the Civil Code. Rather, the test is dependent upon satisfying whether there was an exercise of care in the performance of the obligations.

Pursuant to Article 124, the personal obligations may arise from either contract, unilateral acts, acts causing harm (torts) and acts conferring a benefit, and the law.

Article 196 of the Civil Code states that 'any condition purporting to provide exemption from liability for a harmful act shall be void'. It is considered that this article concerns both

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2 The Dubai International Financial Centre (DIFC) is a free zone in the UAE, which has its own separate court, Arbitration Centre and laws separate to that of onshore UAE.

claims for breach of contract and any tortious claims. Despite that, Article 390 indicates that contractual liability can be limited (i.e., in the form of liquidated damages); however, it is not permissible under the law to reduce liability arising from tortious claims.

Given that professional negligence can lead to significant loss and damage, there are a number of insurance providers in the UAE who provide coverage for professional indemnity. The most common forms of professional indemnity policies available in the UAE are industry-specific, such as the following:

- a* directors' and officers' insurance to cover the management of companies;
- b* errors-and-omissions insurance for brokers, consultants, lawyers, etc.;
- c* construction professionals' (such as architects and engineers) insurance;
- d* accountants', auditors' and financial consultants' insurance; and
- e* medical malpractice insurance for doctors, specialist or hospitals.

It is also worth noting that it is not uncommon for professional indemnity insurance products in the UAE to exclude coverage for wilful misconduct, fraud or gross negligence. It is in those instances that the companies (and, in certain circumstances, the individual at fault) may be liable for damages. Otherwise, those parties may be liable for any damages that exceed the limit of the policy.

Pursuant to Article 292 of the Civil Code, '[i]n all cases, the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that this is a natural result of the harmful act'.

If the harm was caused by a number of different persons, then they shall be liable to the extent of their contribution, pursuant to Article 291 of the Civil Code.

There are a number of defences to professional negligence, including those related to the lapse of time (limitation periods as discussed below) or demonstrating that the party at fault exercised such care as a reasonable person (in the same circumstances) would have exercised. Further, the doctrine of contributory negligence has been raised in a number of UAE cases; however, its application to professional negligence has yet to be tested in the UAE.

ii Limitation and prescription

The limitation period in respect of breaches arising from contract is 15 years according to Article 296 of the Civil Code; and the limitation period arising from a breach of duty is three years pursuant to Article 298 of the Civil Code. The latter would also apply to medical malpractice claims. There are also other matters to consider when determining limitation periods, and advice should be sought to obtain clarity.

iii Dispute fora and resolution

In the UAE, onshore claims for professional negligence are typically commenced in the court of first instance, which has jurisdiction to hear all civil lawsuits. Further, the Dubai International Financial Centre courts have the jurisdiction to hear professional negligence matters in circumstances where the DIFC is the appropriate forum and has been host to a number of high-profile cases.

iv Remedies and loss

Those who have suffered loss arising from someone else's negligence can apply to the court for compensation by virtue of Article 389 of the Civil Code. That section states that 'if the amount of compensation is not fixed by law or by the contract, the judge

shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof.’

Further, actions for specific performance are covered by Article 338 of the Civil Code, which states that ‘[a] right must be satisfied when the legal conditions rendering it due for performance exist, and if an obligor fails to perform an obligation, he shall be compelled to do so either by way of specific performance or by way of compensation in accordance with the provision of the law.’

In respect of medical negligence claims, compensation shall be payable for any harm caused to a person, pursuant to Article 299 of the Civil Code.

II SPECIFIC PROFESSIONS

i Lawyers

The governing law for lawyers in the UAE at a federal level is Federal Law No. 23 of 1991. Dubai Law No. 32 of 2008 is relevant for Dubai legal practices. The Government of Dubai Legal Affairs Department is the relevant authority, established under Article 3 of the above Law, responsible for regulating the legal industry in Dubai, and the Abu Dhabi Judicial Department is the reciprocal authority in Abu Dhabi.

Lawyers who breach their duties as stipulated in Federal Law No. 23 of 1991 may be issued a caution, suspended from practising for a period not exceeding two years or be struck off the roster permanently.

Professional indemnity insurance is a prerequisite for legal practices in Abu Dhabi and Dubai.

ii Medical practitioners

Medical malpractice matters previously fell within the scope of the Civil Code; however, since the introduction of Federal Law No. 10 of 2008 and its successor, Federal Law No. 4 of 2016, medical negligence is now covered by Article 3 of the latter instrument, whereby: ‘Any person who practises the profession in the state must perform the duties of his job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’ and Article 14, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the same degree and specialisation is supposed to be aware of; a failure to follow the recognised professional and medical standards; a failure to act with the necessary due diligence and; negligence and a failure to act carefully and with precaution.

The above Articles indicate that a breach of duty (in a medical context) is determined by the failure to follow prescribed practices or standards and it is not dependent upon the outcome of the medical intervention.

The Medical Liability Supreme Committee (the Committee), comprising 10 members, was established pursuant to Article 18 of Federal Law No. 4 of 2016. The Committee is responsible for determining whether a medical error has occurred, the damage caused and whether a causal relationship exists between the fault and the damage. The Committee responds to matters presented through the Ministry of Health and Prevention (or local health authorities), the Public Prosecution or the UAE courts.

Pursuant to Chapter IV of Federal Law No. 4 of 2016: 'the [medical] profession may not be practised in the UAE without an insurance against civil liability for medical errors [by] an insurer licensed in the UAE'.

iii Banking and finance professionals

The legislative instruments that govern the banking sector are Federal Law No. 10 of 1980, Federal Law No. 18 of 1993 and Federal Law No. 6 of 1985.

The UAE Central Bank is the overarching regulatory authority in the UAE, except for the Dubai International Financial Centre, which is governed by the Dubai Financial Services Authority.

iv Computer and information technology professionals

The Telecommunications Regulatory Authority, established pursuant to UAE Federal Law No. 3 of 2003, is the authority responsible for regulating the information technology sector in the UAE.

In carrying out its functions, the Telecommunications Regulatory Authority has the following objective, pursuant to Article 13 of Federal Law No. 3, *inter alia*: 'ensure that the telecommunications sector provides high quality and efficient services to subscribers'.

v Real property surveyors

Specifically in relation to Dubai, Law No. 6 of 2017 on the Regulation of Land Survey Work was introduced to provide guidance to the surveying industry. Specifically, Article 4 of Law No. 6 states 'This law aims to achieve the following: 1. Regulating and implementing Land surveys, Water Surveys, and Seismic Surveys in the Emirate (of Dubai), in accordance with the best international practices applied in this regard'.

Pursuant to Article 5 of Law No. 6, the Municipality of Dubai is the 'competent authority to regulate the survey works in the Emirate (of Dubai) and the official authorised source for providing the data and information resulting therefrom'.

vi Construction professionals

There are a number of insurance policies that need to be considered in the construction industry from a negligence perspective. The obligation to obtain professional indemnity insurance does not arise from statute in the UAE but rather from the provisions of the construction contracts between the parties. There are two major types of negligence-related actions that are considered herein, namely professional indemnity and decennial liability.

The necessity for professional indemnity insurance arises out of the professional aspects of the construction industry, such as drafting and preparing designs for projects. These policies are usually on a 'claims-made' basis, whereby the policy in force at the time of the event leading to the claim is the applicable policy, as opposed to the policy in force at the time when the negligent event occurred.

Decennial liability arises out of the operation of Articles 880 to 883 of the Civil Code. In essence, architects and contractors carrying out works may opt to obtain and renew project-specific insurance for a period of 10 years (unless the contract specifies a longer period) commencing from the time of delivery of the work as they are 'jointly liable for a period of 10 years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect that

threatens the stability or safety of the building’. The problem arises in the UAE that this type of coverage is difficult to acquire and is very expensive, particularly when held over a period of more than 10 years.

vii Accountants and auditors

The Accountants and Auditors Association is the national accountancy body in the UAE. That body was established in accordance with Ministerial Decree No. 227 of 1997.

Pursuant to Article 5 of the above Decree, one of the major objectives of the above regulatory body is: ‘[t]o propose the suitable organisation for the field control to ensure the implementation of the accounting and auditing standards by the chartered accountants and auditors so that they observe the rules and regulations of the profession and the prevailing economic laws in the country’.

Pursuant to Article 9 of the above Decree, the duties of the members of the Accountants and Auditors Association are as follows:

1. *The member shall endeavour to attain the goals of the association and shall abstain from any acts that harm others or the association or damage its reputation.*
2. *To follow the statute of the association, its bylaws and the resolutions of the Board of Directors. He shall inform the Board of Directors about any violation committed by others . . .*
4. *He shall be a good example in his conduct and behaviour.*

viii Insurance professionals

The Insurance Authority is the regulatory body responsible for the regulation of insurance professionals in the UAE. That body was established pursuant to Federal Law No. 6 of 2007.

Pursuant to Article 7 of the above Law, the Insurance Authority ‘aims at organising and overseeing the insurance sector in a way that would ensure suitable environment to develop it and enhance the role of the insurance industry to secure lives, properties and liabilities against risks to protect the national economy’. Further, the Insurance Authority shall carry out the following duty: ‘Enhancing performance and efficiency of the insurance companies and binding them to observe the profession’s code and rule of conduct to enhance their capabilities to render the beneficiaries of the insurance the best services and attain constructive competition’.

III YEAR IN REVIEW

The introduction of laws specific to medical negligence has been the most significant development from a professional negligence perspective over the past 18 months in the UAE. Pursuant to Article 3 of Federal Law No. 4 of 2016, doctors may now be liable for medical negligence if they do not ‘perform the duties of [their] job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’.

The standard of care required by doctors is now defined by Article 14 of the above Federal Law, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the

same degree and specialisation is supposed to be aware of; failure to follow the recognised professional and medical standards; failure to act with the necessary due diligence; and negligence and failure to act carefully and with precaution.

IV OUTLOOK AND FUTURE DEVELOPMENTS

It will be interesting to see whether the above laws relating to medical negligence will open the floodgates for other professions. One would assume that lawyers may be next in line to be bound by specific negligence provisions; however, for the moment it is only doctors in the UAE that are under the spotlight. Actions brought against professionals (other than those within the medical profession) remain governed by the Civil Code for the time being, which makes these claims difficult to commence, particularly given the considerable evidential burden that must be achieved to demonstrate the link between the purported omission or error and the loss suffered.

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Omar has also developed a significant practice in administrative litigation, including discrimination cases; antitrust is his other passion. He helps companies in mergers, cartel investigations and other antitrust-related proceedings. He embraces a hands-on approach when tackling cases and he advises, trains, teaches and lives antitrust law. Omar tries cases before competition authorities and federal courts, including the Supreme Court. He is equally at home in academia and has written more than 40 thought leadership pieces on competition, litigation and arbitration, and he speaks on these topics regularly. These experiences instil in Omar a commitment to providing valuable solutions for his clients.

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Philipp Käzig has more than 20 years of experience in litigation and arbitration. He heads the litigation/arbitration team at STAIGER Attorneys at Law Ltd and represents clients in commercial disputes before the courts and administrative authorities. His practice includes acting as counsel and as arbitrator in ICC, Swiss Rules, VIAC, LCIA and ad hoc arbitration proceedings. Philipp Käzig is the author of numerous publications in the area of civil procedure and civil law and recommended by *The Legal 500* for commercial litigation, insolvency and corporate recovery.

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Michael Kortbawi is a partner in BSA's corporate practice with a strong focus on insurance, based in Dubai, UAE. Michael has gained hands-on experience in the Middle East and North Africa region, having practised in the UAE for over 11 years and supervised the organic growth of BSA into the six countries in which it now operates.

Michael's specific areas of experience include directors' and officers' duties under UAE and DIFC laws, the setting up of insurance and reinsurance companies in the GCC, business acquisitions in the energy sector, joint ventures in various industries and deregistration of commercial agencies, and corporate and regulatory advice in relation to cross-border business transactions, real estate, insurance and mergers and acquisitions across the Middle East.

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Karoline S Kreyberg is a senior lawyer at Wikborg Rein's Oslo office and is part of the firm's contract law practice. She is a key person in the firm's trade law team. Kreyberg mainly works with dispute resolution, counselling and contract negotiations, and has experience from several major litigations, including court-sponsored mediations. Furthermore, she has broad experience with handling tort and negligence claims and has been mentoring the firm's associates when preparing for their first trials. Kreyberg also has experience with public procurement law and has contributed to several publications within the field. She has been an employee-elected board member of Wikborg Rein. Kreyberg is currently on leave working as an overseas manager for Wilhelmsen Ship Management in Bangkok, Thailand, where she has gained further experience within international contract law, including BIMCO's standard contracts, various types of negotiations and corporate law/transactions. She has previously lived and worked in Brazil and studied in France, and she can speak and read French.

EDUARDO LOBATÓN GUZMÁN

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Eduardo Lobatón focuses on international and domestic arbitration proceedings, civil and commercial litigation proceedings and antitrust matters. Eduardo takes ownership of cases, understanding clients' business and objectives.

Eduardo graduated top of his class and *summa cum laude* from Instituto Tecnológico y de Estudios Superiores de Monterrey (ITESM). He also studied diverse aspects of international and transnational law in London, obtaining a certificate in transnational legal studies from the Georgetown Center for Transnational Legal Studies. Eduardo's academic background includes the captaincy of his university's international arbitration team for two consecutive years and obtaining an honourable mention for his performance in the competition. He also received the CENEVAL Award for Excellence in Performance in the law degree exam.

Since joining Hogan Lovells, Eduardo has represented and advised clients in complex litigations and arbitrations in diverse industries, including insurance, construction, infrastructure, energy, food, automotive and IT. Eduardo lives arbitration and litigation.

Eduardo is also passionate about academia. He is currently a professor of civil law at his alma mater. He previously served as head coach for the Georgetown Center of Transnational Legal Studies' team in the most prestigious international arbitration competition, and he currently serves as head coach for ITESM's team for the same competition. In the past, he has also served as head coach for the ITESM team in the domestic arbitration competition, obtaining the first place. He regularly writes on arbitration and litigation topics.

APRIL MCCLEMENTS

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April McClements is a partner in the insurance and dispute resolution team. April is a commercial litigator and specialises in insurance disputes.

April advises insurance companies on policy wording interpretation, complex coverage disputes (in particular, relating to financial lines policies), D&O claims, cyber, professional indemnity claims, including any potential third-party liability, and subrogation claims. April manages professional indemnity claims for various professionals, including insurance brokers, architects, engineers and other construction professionals, for a variety of insurers.

April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediation and arbitration.

April is a member of the Law Society of Ireland, the Insurance Institute of Ireland and the British Insurance Law Association. She has contributed to various industry publications and has participated in seminars as a speaker on insurance issues.

ALEXANDER MIKHAILOV

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Alexander Mikhailov specialises in the representation of clients in complex criminal cases related to economic crimes in the course of criminal investigation, in the court, as well as at the pre-investigative stages. Alexander participates in various projects in the field of civil, criminal, administrative law and has a huge experience in representation of the client's interests of clients in criminal-related matters, including representation as victims.

He has vast experience in provision of the advice on the compliance issues as well as in conducting internal investigations.

Previously, he worked as an investigator in the State Investigative Committee of Russia and as a deputy prosecutor in the local and regional prosecutor's offices.

LAURA PELEGRINI

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Laura Pelegrini obtained her LLB from the Faculty of Law of São Bernardo do Campo (FDSBC) in 2009; her specialisation in contract law from the Paulista School of Law (EPD) in 2011; her postgraduate degree in consumer rights from the Pontifical Catholic University of São Paulo (PUC/SP) in 2016; and her LLM from the Pontifical Catholic University of São Paulo (PUC/SP) in 2018. Laura currently renders legal advisory services, on matters regarding civil liability, financial lines, life and transport insurance fields. She is a recommended lawyer in *The Legal 500 2017*.

LAURA PELLY

Matheson

Laura Pelly is a senior associate in Matheson's insurance disputes team in the commercial litigation and dispute resolution department. She joined the team in July 2017, moving from

Duncan Cotteill in New Zealand. Laura has over 12 years' experience as a civil litigator in Ireland (solicitor) and New Zealand (barrister and solicitor) and is experienced in managing large and complex disputes from across the insurance, financial and health sectors.

In the insurance sector, Laura supports clients across a range of industries in relation to the entire spectrum of insurance-related issues. She advises insurance companies and corporate policyholders on policy wording interpretation and drafting, complex coverage disputes (in particular, relating to financial lines and public liability policies), D&O claims and subrogation claims. Laura has also managed a variety of high-value professional indemnity claims and litigation against professionals, including insurance brokers and financial advisers, for a variety of insurers.

Laura specialises in coverage advice and disputes relating to directors' and officers' liability insurance policies, income and mortgage protection policies and life insurance policies.

ANDREW POOLE

Gorrissen Federspiel

Andrew Poole is a dispute resolution consultant at the Copenhagen office of Gorrissen Federspiel. He has over a decade of dispute resolution experience, within both private practice and institutional bodies. He completed a Master of Laws (LLM) at the University of Stockholm.

CAMILA AFFONSO PRADO

Demarest Advogados

Camila Affonso Prado obtained her LLB from the Armando Alvares Penteado Foundation (FAAP) law school in 2006; her postgraduate degree in civil law from the Mackenzie Presbyterian University in 2009; and her LLM in civil law, in 2012, and her LLD in civil law, in 2016, both from the University of São Paulo (USP). Her practice is focused on claims adjustment involving general liability and financial lines, drafting and review of insurance contract clauses, drafting of legal opinions in the different lines of insurance, insurance administrative procedures, and review of reinsurance contracts.

Camila Affonso Prado was recommended as a 'next generation lawyer' in *The Legal 500 2017* and *2018*.

JACOB SKUDE RASMUSSEN

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Jacob Skude Rasmussen is a partner at the Copenhagen office of Gorrissen Federspiel. He specialises in dispute resolution and appears regularly before Danish courts, as well as in national and international arbitrations. He completed a Master of Laws (LLM) at the University of Lund in 2004, and the following year he graduated with a master's degree in law from the University of Copenhagen. He was admitted to the Danish Bar in 2009 and obtained the right of audience before the Supreme Court of Denmark in 2017.

For several years, he has been assistant professor in international and European commercial law at the University of Copenhagen. He is a member of the Danish branch

of the Comité Maritime International and the International Law Association, as well as a member of the Danish Arbitration Association. He is also a member of the advisory board of the Danish Institute of Arbitration on Maritime Disputes.

Jacob has acted as advocate in national as well as international arbitrations (institutional and ad hoc) and in large-scale domestic litigation. His recent work as counsel includes disputes in relation to oil and gas, shipping and professional liability (inter alia, liability following the bankruptcy of one of Denmark's then largest banks).

LAURA RESTREPO MADRID

Tamayo Jaramillo & Asociados

Laura Restrepo Madrid is a lawyer and partner at Tamayo Jaramillo & Asociados. A graduate of the Pontifical Bolivarian University (UPB), she also has graduate degrees in liability and insurance law from EAFIT University (degree work: 'Physiological Damage in Colombian Law') and insurance law from the Pontifical Xavierian University; she also holds an LLM in law and economics from the University of Manchester, England (thesis: 'Economic Analysis of Civil Liability in Latin America').

CARL ROTHER-SCHIRREN

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Carl Rother-Schirren is a senior associate in Hamilton's dispute resolution practice. He specialises in arbitration as well as commercial litigation and is particularly experienced in disputes relating to professional negligence, M&A transactions, supply agreements and insolvency matters.

REBECCA RYAN

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Rebecca Ryan is a partner in the healthcare group in the commercial litigation and dispute resolution department at Matheson. She has over 18 years' litigation experience in Ireland and the United Kingdom in clinical malpractice, professional negligence, product liability, diseases litigation and personal injury.

Rebecca is a leading healthcare lawyer and advises clinical practitioners and the Medical Protection Society on the defence of high-value and complex medical malpractice claims in the superior courts. Rebecca also appears before the Medical Council regarding regulatory proceedings, at inquests and other tribunals of inquiry held by bodies such as the Health Service Executive and the Health Information and Quality Authority. Rebecca provides general healthcare advice to healthcare professionals. Rebecca is an accomplished advocate with a keen interest in mediation and alternative dispute resolution. She advised on one of the first clinical negligence mediations to take place in Ireland.

Prior to joining Matheson in 2008, Rebecca qualified as a solicitor with UK law firm Russell Jones & Walker, practising in all areas of personal injury and disease litigation. During her time with RJW, Rebecca was involved in the pilot scheme for the pre-action protocol prior to its launch in 1999. She proactively pursues the opportunity to utilise her experience in developing a training programme for law firms in Ireland on the launch of the

long-awaited Irish pre-action protocol. Rebecca was invited by Ms Justice Mary Irvine to make recommendations to the Working Group on Medical Negligence Litigation and the upcoming reforms based on her UK experience of CPR.

Rebecca lectures to the industry and the Law Society of Ireland on healthcare-related topics and is a regular contributor to leading healthcare journals.

Rebecca is a member of the Medico-Legal Society of Ireland and is also on the board of the Rotunda Hospital.

ADRIANO SQUILACCE

Úria Menéndez – Proença de Carvalho

Adriano Squilacce has been a litigation lawyer at Úria Menéndez – Proença de Carvalho's Lisbon office since 2006 and became partner in 2019. He focuses his practice on civil, commercial and corporate litigation, arbitration, white-collar crime and administrative offences dealing with financial regulation. Over the past few years he has represented clients in complex matters and disputes related to white-collar crime (both judicial proceedings and corporate compliance) and administrative infringement proceedings on banking, finance and securities issues. Adriano has ample experience in disputes related to financial products, securities, prospectus liability and liability of directors and auditors, as well as fraudulent insolvencies. He obtained his law degree from the University of Coimbra (2006). Adriano Squilacce is recommended for dispute resolution in Portugal by *Chambers Europe* (2016–2019) and *The Legal 500 2017–2019*, and by *Best Lawyers in Portugal* (2016–2019 editions).

JONAS STÜSSI

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Jonas Stüssi is a partner in STAIGER Attorneys at Law Ltd's dispute resolution team. He has specialised in commercial litigation as well as arbitration. His additional expertise is corporate law. Jonas Stüssi advises clients in a wide range of industries, such as insurance, banking, mechanical engineering and construction. Jonas Stüssi is recommended by *The Legal 500* for commercial litigation.

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Adam Tighe is an associate in BSA's corporate and insurance practices, based in Dubai, UAE.

Adam specialised in personal injury (claimant) and insurance litigation for two years post qualification in Australia before relocating to London. Adam worked in the UK government legal department and a private firm in London, where he was on the litigation team and had exposure to various insurance disputes. His areas of expertise are product liability, public liability, property damage, general insurance, personal injury and recovery claims.

SONA TSATURYAN

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Sona Tsaturyan, a very talented business law student, supports both the arbitration and litigation team at KNOETZL and has already made a name for herself for in-depth and

thoughtful research and legal writing. Her languages skills – besides excellent Armenian, German and English, she also speaks Russian and Italian – as well as her commercial flair and training with one of the big four tax firms combine to make her a highly valued member of KNOETZL's dispute resolution team.

JORGE FRANCISCO VALDÉS KING

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Jorge Valdés King has a keen eye for assessing risks in legal strategies and for keeping surprises to a minimum. He ensures that he knows the ins and outs of a case and handles all dispute matters with perseverance and passion – Jorge leaves no stone unturned.

Having been involved in the area of dispute resolution since the beginning of his career, Jorge has developed robust trial experience, which allows him to remain calm and creative even in the most pressing circumstances.

As well as working on the annulment, recognition and enforcement of domestic and international arbitration awards and foreign judgments, Jorge has represented both creditors and debtors in complex reorganisation and bankruptcy proceedings. He has briefed and argued before federal courts and the Supreme Court, setting precedents on the unconstitutionality of legal provisions.

From a commercial litigation perspective, Jorge has a background in cases dealing with contractual disputes, torts, shareholder controversies, moral damage claims, real estate issues and all kinds of collections.

Jorge's dispute resolution skills have helped clients in many sectors, including the automotive, banking, construction, entertainment, gambling, insurance, media, mining, transport and IT industries. As part of his diverse practice, Jorge assists clients in both English and Spanish.

Before joining Hogan Lovells (formerly Barrera, Siqueiros y Torres Landa), Jorge clerked at the legal clinic of the school of law of the Panamerican University. He graduated with honours from law school and was elected president of the student board. Jorge holds two postgraduate degrees, including an LL.M. from Harvard Law School.

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Ana Isabel Villa Henríquez is a lawyer and partner at Tamayo Jaramillo & Asociados. A graduate of EAFIT University, she also has a graduate degree in liability and insurance law from the same university and holds an LL.M. in medical law from the University of Edinburgh, UK.

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