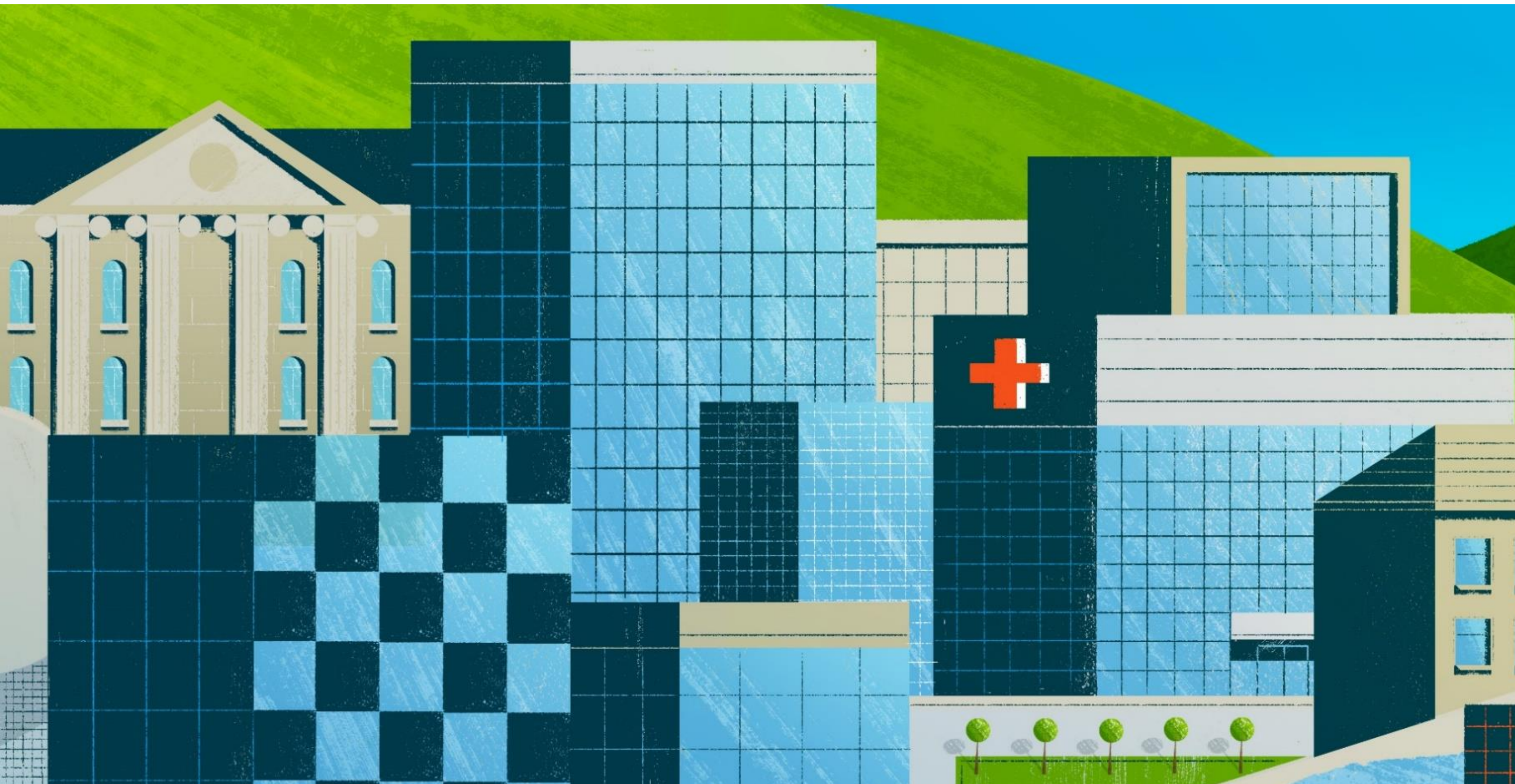
Professional Negligence update for the Financial Planning Standards Board Ireland



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1 INTRODUCTION

1.1 Financial planners must consider a variety of legal and ethical duties when dealing with clients as part of their practice. Although the most obvious duties arise from the contractual relationship between financial planner and client, the legal implications that can arise for a practitioner are not confined to the four corners of an agreement. Financial planners can face claims which are grounded in negligence, a branch of the law of tort.

1.2 Tort law is far-ranging and encompasses many “civil wrongs”, including trespass, nuisance and defamation.

1.3 In this update, however, we are focusing only on areas of negligence that are most likely to impact financial planners: breach of duty, professional negligence and economic loss. In addition, we will examine the standard of care that applies to professionals, particularly financial practitioners and we will provide a brief synopsis of when companies can be made vicariously liable for the acts of their employees and / or agents.

2 BRIEF BACKGROUND TO LAW OF TORT AND NEGLIGENCE

2.1 Before we look in detail at the areas of tort law that carry particular significance for financial practitioners, it is useful to first provide a general overview of this area of law.

2.2 In simple terms, a “tort” means a civil wrong, ie a wrong committed between private parties. The law of tort covers wrongs (both intentional and unintentional) that arise out of a breach of a duty imposed by law, as opposed to contractual duties.

Negligence overview

What is negligence?

2.3 Negligence is a tort that involves the breach of a legal duty of care where damage is caused to the party to whom the duty is owed.

2.4 As discussed below in further detail, for a successful negligence claim there must be:

(a) a duty of care between the parties;

(b) a failure to meet the required standard of care that arises from that duty; and

(c) reasonably foreseeable damage suffered.

Who owes a duty?

2.5 The law recognises that many relationships carry a duty of care, for example employers to employees, road users to other road users and pedestrians, possessors of skills to those who rely on that skill, and producers of goods to consumers.

How much care does one have to take?

2.6 The degree of care required is reasonable care.

What is the standard of care?

2.7 The standard of care is the foresight and caution of the ordinary or average prudent person.

Who has to prove negligence?

2.8 In most cases, the burden of proving negligence rests with the plaintiff.

Background to negligence

2.9 The landmark case of *Donoghue v Stevenson*[1] set out the tort of negligence for the first time. This case "*exploded the fallacy that since there was no contract between the plaintiff and the defendant there could be no liability in tort between the parties*"[2].

2.10 The facts in the case are famous. The plaintiff drank a bottle of ginger beer that her friend had purchased for her. When she got to the bottom of the bottle, she found a decomposing snail and immediately became ill. The plaintiff did not have any legal recourse against the vendor of the beverage because she had not purchased it (ie no contractual relationship existed between them). However, the court ultimately held that the plaintiff *did* have a case against the manufacturer of the bottle and could recover damages on that basis. The judgment in this case articulated the "neighbour principle". The essence of this principle is that we all owe a duty of care to our figurative neighbour – someone who is so closely and directly affected by our action (or omission) that we should have them in mind when we commit an act.

3 BASIC PRINCIPLES OF NEGLIGENCE

We will now review the various principles involved in the tort of negligence.

Duty of Care

3.1 The existence of a duty of care is the first step in proving any claim of negligence. If a plaintiff cannot prove that there was a duty of care, they will not be able to sustain a claim of negligence. In deciding whether a duty of care exists, there are three things a court will look at:

1. Foreseeability	*could the harm have been anticipated?*
2. Proximity	*was there a sufficient relationship of proximity between the parties? This might be physical, geographical, legal or moral created by an assumption of control.*
3. Is it fair, just and reasonable to impose liability	*are there factors outside the direct relationship between the plaintiff and the defendant that might lead a court to refuse to impose liability? For example, would imposing liability go against public interest?*

[1] *Donoghue v Stevenson*[1] [1932] AC 562

[2] McMahon, B. M. E., & Binchy, W. (2013). "Law of Torts"

3.2 It is worth noting that in any case a court will consider whether a duty of care exists on the facts of each case. The above factors are not individual tests but rather they should be viewed as part of an overall consideration of the duty of care.

Breach of duty

3.3 Once it has been established that a duty of care does exist, a court must then assess if this duty has been breached.

3.4 As you might expect, the courts do not adopt a "*one size fits all*" approach when assessing whether a duty of care has been met.

3.5 Rather, the test is objective:

would a hypothetical, reasonable person consider the relevant action or omission to be negligent?

3.6 What may be considered reasonable in one situation may not be reasonable in a different situation. For example, the duty of care arising between a brain surgeon and his patient on the operating table is not the same duty owed by the hospital porter. Similarly, the duty of care owed by a financial planner to a client when providing financial advice is different to the duty owed by an online influencer who might give unsolicited investment advice to the world at large without the requisite knowledge or qualification. Accordingly, a court will typically look at some varying factors when considering what a reasonable person would consider. A non-exhaustive list of some of these factors is set out below:

- The age, knowledge, experience and profession of the parties
- Any relevant social and cultural factors
- The likelihood of the risk occurring
- The seriousness of the consequences
- Any special relationship between the parties

3.7 Where an individual is acting in a professional or technical capacity, a higher standard of care may be expected. This "*special relationship*" factor will be of considerable interest for financial planners and we will consider it in further detail later.

3.8 Typically, the actions of a professional will be judged by reference to the skill and standards routinely employed by their peer group. Accordingly, it is likely that a court would take into consideration standards such as the Financial Planning Standards Board's own Financial Planning Process, FPSB Ireland's Professional Code (the "**FPSBI Code**") or the FPSB Global Financial Planning Standards when assessing whether a financial planner has failed to meet the standard of care.

Damage

3.9 The third element of proving negligence, once a duty of care has been established and that duty has been breached, is that the breach of that duty caused damage of a recognised type. This could include physical injuries, financial losses or emotional distress. The damages claimed must directly result from the breach.

Causation

3.10 The fourth element in the tort of negligence is causation. A plaintiff must have suffered loss or damage as a result of the defendant's negligence.

3.11 As with other negligence concepts, the test for causation is an objective test which asks:

what would a hypothetical reasonable onlooker have foreseen as a possible (not necessarily likely) type of damage from this action?

3.12 If this reasonable, hypothetical onlooker would not have foreseen that the type of damage complained may flow from the action complained of, then a court may decide that the consequences are too remote.

3.13 This element can get somewhat complicated when there is more than one possible cause of the damage. Courts have dealt with this problem by adopting a "*but for*" test:

causation is proved where the plaintiff can establish on the balance of probabilities that the injury would not have occurred <u>but for</u> the defendant's negligent behaviour.

3.14 Where there are concurrent or cumulative causes of damage, the courts operate a "*material contribution*" test. Under this test, liability will be imposed if the actions made a material contribution to the damage.

3.15 Now that we have set out the basic principles of the tort of negligence, we will turn to focus on the particular forms of negligence that are likely to impact financial planners.

4 NEGLIGENT MISSTATEMENTS AND ECONOMIC LOSS

4.1 A negligent misstatement occurs where there is a representation of fact that has been made carelessly and is incorrect. The same principles discussed above that apply to negligence typically also apply to negligent misstatement ie there must be a duty of care, a breach of that duty and damage caused by that breach. This should be of paramount importance to financial planners who provide financial advice to clients in the course of their business.

4.2 An obvious example of a negligent misstatement case is a careless or downright incorrect response to a request for a specific piece of information. Conversely, liability may also be imposed for an omission to make a statement when a duty to make one existed.

4.3 Pure economic loss, as you might expect, is economic or financial loss that is unaccompanied by physical injury or property damage. This type of loss typically flows from negligent advice. Damages for economic loss will be awarded where it is accompanied by other physical damage.

4.4 Tort claims that a financial planner might face are likely to be claims relating to negligent misstatement causing purely economic loss. We have included some examples of negligent acts and omissions that may cause an individual to suffer purely economic loss.

Examples of positive statements:	*Example of omissions:*
Recommending financial products that are risky or unsuitable for a client's circumstances	Failing to warn a client of all of the risks involved in a plan.
Recommending financial products without obtaining adequate information about a client's financial priorities or risk appetite	Failing to offer alternative investment options

4.5 Historically, negligent misstatements were not actionable unless there was some fraud on the part of the person making the representation. However, the decision in *Hedley Byrne & Co v Heller & Partners*[3] confirmed that liability could arise from negligent misstatement.

4.6 That case involved a reference as to the creditworthiness of a customer given by one bank to another bank. Hedley Byrne were advertising agents who had placed a significant number of adverts on credit for a company called Easipower. If Easipower did not pay for the advertising, then Hedley Byrne would be liable for any shortfall. To protect themselves, Hedley Byrne asked their bank to get a credit reference from Easipower's bank (Heller & Partners). Heller & Partners provided a positive and favourable reference for Easipower, although the report contained an exclusion clause to the effect that the information was given "*without responsibility on the part of this Bank or its officials*". On foot of the report received, Hedley Byrne placed adverts for Easipower, however Easipower subsequently went into liquidation and Hedley Byrne suffered financial loss as a result.

4.7 Hedley Byrne brought an action against Heller & Partners for damages under the tort of negligence. The court held for the first time that a negligent (even if honest) misstatement can give rise to an action for damages for financial loss even if there was no contract between the parties. The case confirmed that the law will imply a duty of care where a customer seeks information from an advisor who has a special skill and where (i) the customer trusts the advisor to exercise due care and (ii) the advisor knew or ought to know that reliance was being placed upon their skill or judgment.

4.8 On the facts of this particular case, the defendants were not liable on foot of the disclaimer of liability contained in the reference, however the case still established the doctrine of negligent misrepresentation.

4.9 In summary, *Hedley Byrne* set out that in order to establish liability in respect of statements, a plaintiff must show:

1. reliance on a statement
2. reliance was (1) foreseeable and (2) reasonable, and
3. there was a 'special relationship' between the parties.

[3] Hedley Byrne & Co v Heller & Partners [1963] 2 All ER 575

Foreseeability and reasonableness

4.10 It must be foreseeable that a plaintiff would rely on the statement in question and that this reliance is reasonable. The courts make decisions on a case-by-case basis, however there are some situations in which foreseeability will almost certainly be found. For instance, it is foreseeable that financial advice provided by a financial planner who holds themselves out as having professional qualifications would be reasonably relied upon by their client.

'Special relationship'

4.11 The 'special relationship' requirement can also be read as a standard of care requirement. As we mentioned at 3.8 above, the standard of care owed will vary if there is a 'special relationship' between the parties.

4.12 While there is sparse case law in this area, with very few cases which directly relate to financial planners, we have set out below some examples of where the courts have deemed a 'special relationship' to exist.

4.13 In *McCarthy v James Kavanagh t/a Tekken*[4], the plaintiff was a customer in the defendant's restaurant late at night when an altercation ensued. The plaintiff was an innocent party who was escorted outside by one security guard for his safety. However, that security guard did not tell another security guard that the plaintiff was the innocent party. The plaintiff ended up being punched, falling over and suffering serious injuries. The restaurant owners were held liable in negligence and a special relationship of proximity was found to exist. The plaintiff was not a stranger unconnected with the premises but a customer, and the duty of care owed to him did not stop at the door of the restaurant.

4.14 In *Securities Trust Ltd v Hugh Moore & Alexander Ltd*[5], the relationship between a limited company and its shareholders was deemed sufficiently close to give rise to a duty to ensure that documents concerning the shareholders' rights, that were supplied to them, were indeed accurate.

4.15 In the case of *Bank of Ireland v Smith*[6], Kenny J commented that the relationship between auctioneer and purchaser was not, of itself, sufficiently proximate in respect of statements concerning the property being auctioned. An auctioneer must not be expected to anticipate that every statement they make in respect of a property will be relied upon.

4.16 However, in the subsequent case of *McAnarney v Hanrahan*[7], a statement by an auctioneer was held to give rise to a duty of care. In this case, the issue was whether an auctioneer negligently induced the plaintiffs to purchase a property by making a negligent misstatement that the freehold interest could be purchased for £3,000, when at that time no negotiations had taken place regarding the purchase of the freehold and the actual market value of the premises was much lower than the price

[4] McCarthy v James Kavanagh t/a Tekken Security [2018] IEHC 101

[5] Securities Trust Ltd v Hugh Moore & Alexander Ltd [1964] IR 417

[6] Bank of Ireland v Smith [1966] IR 646

[7] McAnarney v Hanrahan [1993] 3 IR 492

paid. Costello J held that volunteering specific information, of clear significance to the value of the leasehold interest, gave rise to a duty on the auctioneer to the purchaser.

The Irish position

4.17 The *Hedley Byrne* principles have largely been followed in Ireland. Until recently, the most significant Irish authority in this area was the case of *Wildgust & anor. v The Governor and Company of the Bank of Ireland & Norwich Union Life Insurance Society*[8].

4.18 In this case, the plaintiff, Mr Wildgust and his wife took out a life assurance policy from Norwich Union Life Insurance Society. The policy was assigned to a third party named Hill Samuel Merchant Bankers on foot of a mortgage provided by that entity. On one occasion a monthly repayment was not made so the relevant manager in Hill Samuel contacted Norwich Union to enquire about the missed payment. The manager received a clear (but incorrect) assurance from Norwich Union that an alternative payment had been provided by Mr Wildgust and that everything was "correct and in order". In reality, the policy had lapsed as a result of the non-payment. When Mrs Wildgust died a short time later, Norwich Union refused to pay out on the lapsed policy. Mr Wildgust sued, claiming that he had suffered financial loss as a direct consequence of Norwich Union's negligent misstatement.

4.19 The case made its way to the Supreme Court who found that a duty of care did exist to Mr Wildgust which entitled him to damages.

4.20 Mr Justice Kearns noted that the case raised an important point of law on negligent misstatement and noted that:

> "*those providing the information within Norwich Union to Mr O'Hanlon must have been well aware that it might be relied upon as much by Mr Wildgust as by Hill Samuel.*"

4.21 Judge Geoghegan agreed, noting that:

> "*the person in Norwich Union giving the information (that everything was in order) had reason to believe that Mr Wildgust may have been under the impression that his account was in order and he would also be aware or ought to have been aware that the respondent would pay the premium if a negative answer had been given. It should have been clear, therefore, that an incorrect answer would potentially damage Mr Wildgust*."

Recent Irish case: Walsh v Jones Lang Lasalle Ltd

4.22 In Walsh v Jones Lang Lasalle[9], the Irish Supreme Court reviewed the approach to liability for negligent misstatement.

4.23 In this case, the property investor plaintiff had visited a premises where he met a JLL representative. The representative handed the plaintiff a two-page brochure.

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[8] Wildgust & anor. -v- The Governor and Company of the Bank of Ireland & anor. [2006] IESC 19

[9] Walsh v Jones Lang Lasalle Ltd [2017] IESC 38

The brochure included the agent's contact details, a photograph of the premises and the following area details:

"2,142 m2 (23,057 sq ft); Site Area 0.13 Hectares (0.31 Acres)".

It also included the following disclaimer:

"*Whilst every care has been taken in the preparation of these particulars, and they are believed to be correct, they are not warranted and intending purchasers/lessees should satisfy themselves as to the correctness of the information given.*"

The plaintiff subsequently bought the premises, but later discovered that the premises was 21,248 square feet – not 23,057 as stated in the brochure.

4.24 The central legal issue in this case was whether, in light of the disclaimer in the brochure, the estate agents were liable to the plaintiff for the misstatement. The High Court awarded the plaintiff €350,000 in damages for the negligent misstatement. The Supreme Court ultimately overruled the High Court's finding that JLL owed a duty of care to the plaintiff. The Supreme Court interpreted the disclaimer objectively and considered it to have the impact of meaning there was no assumption of responsibility on the part of JLL in relation to the task of furnishing accurate internal measurements and the consequence was that the law imposed no duty of care on JLL.

4.25 This Supreme Court decision provided fresh and welcomed guidance on liability for negligent misstatements and in particular, the significance of a disclaimer in determining whether a duty arises on the part of the author of the statement in favour of those who rely on it.

4.26 However, it would be unwise to interpret the result of this case as meaning that a disclaimer will always prevent liability arising. Claims of negligent misstatement require a consideration of whether there has been an assumption of risk on the part of the statement-maker or more broadly whether the circumstances are such as to give rise to a duty of care. We discuss the enforceability of disclaimers in greater detail later.

5 STANDARDS OF CARE FOR PROFESSIONALS

5.1 What distinguishes professional negligence from ordinary negligence is the standard of care owed. An action in negligence requires not only that the plaintiff owes the defendant a duty of care but also that the defendant falls below the standard of the "reasonably careful man". The test is an objective one. McNair J summarised this position in *Bolam v Friern Hospital Management*[10]:

> *"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he*

[10] Bolam v Friern Hospital Management Committee [1957] 2 All ER 118

exercises the ordinary skill of an ordinary competent man exercising that particular art."

5.2 In order to prove negligence against a financial planner, a plaintiff will be required to demonstrate that the defendant's behaviour towards him or her fell below the requisite standard of care that was expected of him or her in the circumstances and having regard to the skill that would be expected of an ordinary competent financial planner exercising their profession. The precise definition of a "profession" is something that has not been determined by caselaw. However, certain categories of occupations such as solicitors, doctors, accountants, engineers, financial advisors and financial planners have been traditionally characterised as professions for which an enhanced standard of care will be expected.

5.3 Financial planners, in their professional capacity, have a duty to exercise proper care and skill when providing services to their clients and where they fall below this standard, they will be held liable for any damage they cause as a result.

5.4 In examining the conduct of the professional, the courts will consider all the circumstances, including:

- The likelihood of harm
- The seriousness of the risk
- The risk of serious injury
- The social utility of the act of the defendant (an act with a high social value may alter the court's view of what the defendant should do)
- The costs of avoiding the risk.

The standards of the profession

5.5 In evaluating cases of professional negligence, the court will have regard to the customary practice of the particular profession. Where a member of a profession can establish that they adhered to the customary practice of their profession, this will normally be sufficient to relieve them of liability.

5.6 This principle was outlined by the Irish courts in *O'Donovan v Cork County Council*[11] which concerned an allegation of professional negligence against a medical practitioner. Walsh J concluded that the defendant could not be held negligent if he honours general and approved practice in the situation with which he is faced. Walsh J recognised that there is an important exception to this rule:

> *"If there is a common practice which has inherent defects, which ought to be obvious to any person giving the matter due consideration, the fact that it is shown to have been widely and generally adopted over a period of time does not make the practice any less negligent. Neglect of duty does not cease by repetition to be neglect of duty."*

5.7 The reason for this exception is that the duty imposed by law rests on the standard to be expected from a reasonably careful member of the profession. A person cannot be said to be acting reasonably if they mindlessly follow some custom or the practice in circumstances where, had they given due consideration to the matter, they would have recognised the inadequacy or inappropriateness of the practice.

[11] O'Donovan v Cork County Council [1967] IR 173

This position was reasserted by the Supreme Court in *Roche v Peilow*[12], a case of alleged professional negligence taken against a firm of solicitors, with Henchy J asserting that:

> *"The professional man is, of course, not to be judged with the benefit of hindsight, but if it can be said that, if at the time, on giving the matter due consideration, he would have realised that the impugned practice was in the circumstances incompatible with his client's interest, and if an alternative and safe course of conduct was reasonably open to him, he will be held to have been negligent."*

5.8 The courts will afford a certain degree of deference to the customary practice of a particular profession. In determining what will constitute customary practice, the courts will look to the traditions, rules of self-regulation and codes of practice to be observed by individuals within the profession.

5.9 In the context of financial planning therefore, a court may look to the various professional codes and standards applicable to financial planners in Ireland for the purposes of establishing the requisite standard of care owed to a client. This will include the Financial Planning Standards Board's own Financial Planning Process, FPSB Ireland's Professional Code (the "**FPSBI Code**") or the FPSB Global Financial Planning Standards.

5.10 Examining FPBSI Code, the following statements clearly operate as a standard of what is expected of financial planners:

1) Client First: Placing the client's interests first, in line with the requirements of relevant laws and regulations, is a hallmark of professionalism. This requires that CFP® professionals not place personal, employer or licensee gain or advantage before client interests.

2) Integrity: This requires honesty and transparency in all professional matters. Integrity requires the CFP professional to observe both the letter and the spirit of relevant rules, regulations and laws - including the FPSBI Code. Integrity requires that conduct is guided by a spirit of utmost good faith, with actions that foster a culture of integrity in both themselves and others.

3) Objectivity: This requires that CFP professionals must not allow bias, preference, undue influence, incentives or other inappropriate factors to influence the advice or service they provide to clients, or their dealings with other professionals.

4) Fairness: This requires dealing with clients, colleagues and others in the professional sphere in a way that is just, and treating others in the way you would want to be treated. CFP professionals will have a far higher level of knowledge than clients and non-industry participants. Fairness requires they use their greater knowledge to enable clients to make fully informed decisions, and never present advice or information in a way that omits or distorts material considerations. Importantly, this includes the duty on

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[12] Roche v Peilow [1985] IR 232

financial planners to disclose and manage conflicts of interest. We will take a closer look at this obligation below.

5) Knowledge and Skills: CFP professionals must ensure they have the necessary level of knowledge and skills required to discharge the functions of their role. This includes the self-awareness to identify when it is appropriate to decline the provision of advice or to refer the client to another suitably qualified professional.

6) Continuing Professional Development (CPD): The financial planning profession operates against a background of a quickly moving market and ongoing regulatory change. In order for CFP professionals to continue to deliver high quality outcomes to their stakeholders it is incumbent on them to keep up to date with changes and meet their CPD requirements as set out by FPSB Ireland.

7) Professional Behaviour: CFP professionals must conduct themselves with dignity and show respect and courtesy to clients, fellow professionals and others in business related activities. Professional behaviour requires those in the CFP profession, individually and in cooperation with peers, work to enhance and maintain the profession’s public image and its ability to serve the public interest. This includes providing a high level of client service, meeting commitments in a timely way, providing regular updates and appropriately managing client expectations.

8) Competence: This requires CFP professionals to use their knowledge and skills to deliver high quality outcomes for stakeholders. In particular, advice delivered to consumers should be accurate, up to date and relevant. Recommendations must be implemented in timely and thorough manner.

9) Diligence: CFP professionals must work in a way that is conscientious and exercises a due level of care. They must apply a best practice approach to their dealings with clients and other stakeholders, meeting the standards set out in FPSB Global Financial Planning Standards as appropriate. In the financial planning context, this will require gaining an appropriate understanding of a client’s circumstances and ensuring recommendations are suitable and aligned with the client’s needs.

10) Confidentiality and Data Protection: Due to the volume and sensitivity of client data entrusted to CFP professionals and related individuals, there is an additional level of responsibility on financial planning participants. Client data must be held in a secure manner and CFP professionals must take all reasonable steps to ensure they comply with the requirements to maintain this.

5.11 However, professional codes, although an articulation of standards of conduct and relevant to the standard of care expected of professionals, will not in themselves be conclusive of negligence. In negligence actions, it would be common practice for evidence to be given to show that the defendant had breached the standard of care owed to the plaintiff. In the context of professional negligence, expert evidence may be given to the court to demonstrate the appropriate professional standard in a particular profession. The court needs to be informed of matters beyond the usual capacity of the judge, and expert evidence plays a large part in informing the court as to standards of professional practice.

5.12 This expert evidence is not binding on the court, nor is the professional standard of practice. It is the court that must make the final determination of the standard in the light of all the evidence presented to it.

Conflict of Interest

5.13 There is a duty on financial planners to disclose conflicts of interest to their clients under the FPSBI Code. Some examples of situations where a financial planner should disclose a conflict are where they are likely to make a financial gain at the expense of the client or where they have a financial incentive to favour the interest of one client or over the interests of another.

5.14 Conflicts of interest have been scrutinised by courts in recent years. A recent Court of Appeal ruling in the UK in relation to three linked cases[13] involving PCP car financing is one good example. These cases involved allegations to the effect that information and recommendations provided by car dealers and car finance brokers were influenced by the commission they would receive from the finance provider. Customers were unknowingly enticed into PCP deals with hidden fees and inflated interest. In October 2024, the Court of Appeal held that consumers must know all the material facts that could affect their borrowing decision (including the total commission to car dealers, and how it was calculated) in order to be able to consent to a loan.

A similar expectation to disclose would clearly be applied to financial planners, for example, who might gain the benefit of commission from the sale of a particular product to a client.

5.15 In addition to the above professional standards, there are certain standards of care to be observed by financial planners that are required by statute. Under the Sale of Goods and Supply of Services Act 1980 (as amended by the Consumer Rights Act 2022), the following terms are implied in a contract for the supply of a service – which should include the supply of a financial service – where the supplier, such as a financial planner, is acting in the course of a business:

- the supplier has the necessary skill to render the service; and
- it will supply the service with due skill, care and diligence.

Duty of disclosure

5.16 In order for a client to be in a position to make fully informed financial decisions, they must be provided with sufficient information to enable them to fully appreciate the risks and benefits associated with the decision they are faced with.

5.17 This principle, in addition to the test of the "ordinary competent man" as set out in *Bolam* and discussed above, was recently considered in the Scottish case of *Montgomery v Lanarkshire Health Board*[14]. This case concerned a claim of negligence against a medical practitioner, the Supreme Court finding that the defendant had a duty *"to take reasonable care to ensure that the patient is aware of*

[13] Johnson v Firstrand Bank Limited [2024] EWCA Civ 1282; Wood v Commercial First Business Ltd [2021] EWCA Civ 471; [2022] Ch 123; Hurstanger Ltd v Wilson [2007] EWCA Civ 299; [2007] 1 WLR 2351

[14] Montgomery v Lanarkshire Health Board [2015] UKSC 11

any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments."

5.18 The principle has since been applied to the disclosure of the risks associated with financial products in *O'Hare and another v Coutts & Co*[15]. In this case, the Court considered whether the defendant financial advisor breached its duty to exercise reasonable skill and care when advising the claimants on making certain investments. In its decision, the Court found that the reasoning in respect of disclosure of risks taken in *Montgomery* was not irrelevant outside the medical context. However here, it was relevant that the expert evidence adduced by the parties indicated that there was little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser. The decision reached in *O'Hare* suggests that the giving of investment advice is not simply an exercise of professional skill; an informed investor, like a medical patient, is entitled to decide the risks that he is willing to take and has to take responsibility for his own mistakes.

6 LIMITATIONS TO LIABILITY

6.1 Before considering the permitted instances where liability for negligence may be limited or avoided, it is important to highlight the existence of certain statutory restrictions on the exclusion of liability.

6.2 Under the Sale of Goods and Supply of Services Act 1980 (as amended by the Consumer Rights Act 2022), any contractual provision excluding or restricting liability of a party for pre-contractual misrepresentation (or any remedy available to another party to the contract by reason of the misrepresentation) is unenforceable unless it is shown to be '*fair and reasonable*.' Importantly, the onus is placed on the party relying on the exclusion clause to prove that the clause is fair and reasonable.

6.3 The '*fair and reasonable'* requirement applies to the provision of a service, which would include a financial service, and extends beyond consumers to all recipients of such services. In *Motsumi v Eden Further Education Ltd & Anor* [16], Hogan J in the Court of Appeal observed that a term that purported to exclude a refund even in the case of fundamental breach would be plainly void on the basis of both the '*fair and reasonable*' test and also the requirement to have been specifically brought to the consumer's attention.

6.4 The 1980 Act permits the variation of the implied terms of due skill, care and diligence in the following circumstances:

- by an express term of the contract. Where the recipient of the service deals as a consumer, it must be shown that the express term is fair and reasonable and has been specifically brought to the consumer's attention;
- by a course of dealing between the parties to the contract; or
- by usage binding on the parties to the contract.

[15] O'Hare and another v Coutts & Co [2016] EWHC 2224 (QB)

[16] Motsumi v Eden Further Education Ltd & Anor [2015] IECA 70

Disclaiming liability

6.5 Liability for negligence can be excluded or limited by use of a disclaimer. As we have seen in *Hedley Byrne*, a reference provided "*without responsibility*" removed the defendant of any liability.

6.6 In *Crestsign Ltd v National Westminster Bank Plc*[17], the Court determined that the disparity in knowledge and expertise of the plaintiffs on the one hand and the defendants on the other was such that it was reasonably to be expected that the plaintiff would rely on the defendant bank's skill and judgment. However, in circumstances where the contract entered into between the parties contained clear provisions disclaiming responsibility for the advice given and where such disclaimers were brought to the plaintiff's attention before the transaction was completed, it followed that the defendant had satisfied its duty to the plaintiff.

6.7 A different outcome was reached in *McCarthy v Joe Walsh Tours Ltd*[18]. An arbitration clause the effect of which excluded an award of damages exceeding £5,000 per claim included in a package holiday agreement was held to be ineffective because of the failure of the supplier of services to bring it to the consumer's attention as required by the 1980 Act.

6.8 As can be inferred from the above decisions, not all disclaimers will operate to protect a financial planner in all of the circumstances. In order for a disclaimer to considered valid, it must be:

- Brought to the claimant's notice in a "*clear and unambiguous*" manner (as stated by Laffoy J in the Irish Supreme Court decision *Walsh v Jones Lang Lasalle* and discussed above).
- Cover the circumstances of the case; and
- Not undermined by any misrepresentation.

6.9 Significantly, where there is doubt about the meaning of a disclaimer or exclusion clause, the Unfair Contract Terms Regulations provides that the interpretation most favourable to the consumer shall prevail.

7 VICARIOUS LIABILITY

7.1 Vicarious liability is a legal principle that makes a person or company responsible for the actions of others. Vicarious liability arises in a number of situations. For example, in the medical sphere, a hospital is often held accountable for the actions of its healthcare staff. The most common scenario where vicarious liability is imposed is in the context of the workplace.

7.2 In the workplace, employers can be held accountable for their employees' actions, whether intentional or unintentional, that have caused harm to fellow employees, clients or third parties. This liability generally applies unless there is proof that the

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[17] *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch

[18] *McCarthy v Joe Walsh Tours Ltd* [1991] ILRM 813

employee acted without the employer's knowledge or consent and outside the scope of their employment.

7.3 Many financial planners trade as companies or individuals with employees, agents or representatives acting on their behalf and accordingly, financial planners need to be aware that they could be held liable for the acts of the individuals contracted by them.

7.4 The principle of vicarious liability in the context of an employment relationship was summarised by Lord Pearce in *Imperial Chemical Industries Ltd v Shatwell*[19]

> *"The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it."*

7.5 The reasoning behind the rule lies in the nature of the relationship itself and in particular, the fact that the employer is in control of the employee and the employee is acting in the interests and for the benefit of the employer. There are further practical reasons for holding an employer accountable for the actions of their employees. In many scenarios, an employer will have greater financial means and resources to compensate an injured plaintiff (often through their insurance cover).

7.6 In order to establish that an employer should be held vicariously liable for the actions of their employee, it is necessary to consider whether:

(i) there is a relationship akin to employment; and

(ii) the employee was acting within the scope of their employment.

Relationship akin to employment

7.7 It is not necessary to demonstrate that a contract of employment was in place but rather, that a relationship analogous to employment existed. There have been several notable cases involving defendants seeking to escape liability for the actions of workers on the basis that the worker in question had been engaged not as an employee but as an independent contractor. The courts have approached analysis of the relationship between an independent contractor and an employer in the same way.

Where the employer is considered to exercise sufficient control over the actions of the independent contractor, this will likely be determinative in proving the existence of a relationship akin to employment, for which vicarious liability will attach.

Scope of employment

7.8 The second consideration for the court is whether an employee's actions were carried out within the scope of their employment. Only where an employee is doing

[19] Imperial Chemical Industries Ltd v Shatwell [1965] AC 656:

what they are employed to do or anything incidental to their employment will they be acting within the scope of their employment.

7.9 It follows logically that an employer will not be held vicariously liable for the actions of an employee where the employee's conduct was completely unconnected with their employment. This was considered in *N v Chief Constable of Merseyside*[20]. The High Court of England considered that the Chief Constable was not vicariously liable for an assault carried out by a policeman employed by the Merseyside force in circumstances where it was clear on the facts that the policeman had used his position as an opportunity to commit the assault and was "*on a frolic of his own*".

8 PRACTICAL FACTORS TO CONSIDER

Standard of Care

8.1 Financial planners should take time to fully consider the standard of care that they are held to when engaging with and advising clients. Understanding the standard of care will assist a financial planner in assessing their own conduct and considering whether they continuously meet the expected standard of care in all of their dealings with their clients.

Limitation periods

8.2 As negligent misstatement is a tort, the limitation period within which a plaintiff can bring a claim is six years from the date on which the cause of action accrued. This is normally six years from the date of the action or judgment that caused someone to incur the financial injury. A breach of contract action can only be brought within six years from the date of the breach.

8.3 In cases where there is liability in both contract and tort, a plaintiff may be able to leverage the varying dates of accrual of the cause of action when issuing a claim (if the dates do vary).

When does a cause of action accrue?

8.4 This very question was considered in the context of investment products by the Irish Supreme Court in *Cantrell & Ors v Allied Irish Banks Plc & Ors*[21]*.*

High Court decision

8.5 The High Court was originally asked to determine a preliminary issue as to when the six-year time limitation period began to run for financial loss claims in a group of cases concerning the "Belfry" property investment funds[22].

8.6 The key point to be addressed was when the financial loss (ie the damage) suffered by the investors actually occurred. When the proceedings were before the High Court, the Court decided that the claims of breach of contract and breach of fiduciary

[20] N v Chief Constable of Merseyside [2006] EWHC 3041 (QB).

[21] Cantrell & Ors v Allied Irish Banks Plc & Ors [2020] IESC 71

[22] Following the collapse of the Belfry funds, High Court proceedings issued in 2014 against AIB and various others who were involved in the management of the funds.

duty were statute-barred as those causes of action had accrued at the time the investments were first made.

8.7 However, in relation to the investors' claims in tort for negligence, misrepresentation and negligent misstatement, the Court found that the actual damage occurred on the date the audited accounts demonstrating the loss were signed off by the directors, <u>as that was the date that the damage was reasonably capable of being discovered.</u>

8.8 Those claims were found to fall within the six-year limitation period and were allowed to proceed.

Court of Appeal decision

8.9 When the ruling of the High Court was appealed to the Court of Appeal, the Court found that the cause of action had, in fact, accrued on the date that the investment agreements were first entered into by the investors ie <u>the date of the original investment.</u>

Supreme Court decision

8.10 The matter was further appealed to the Supreme Court which delivered its judgment in December 2020. The Supreme Court set aside the order of the Court of Appeal and restored the order of the High Court, allowing the investors' claims to proceed on the basis that <u>the cause of action accrued on the date the damage was capable of being discovered, not on the date the investment was made.</u>

8.11 The Supreme Court acknowledged that when it comes to economic loss cases, it is not unusual for there to be a delay between the date of the negligent act (ie the bad investment advice) and the date of discovery of the alleged damage (ie the loss). Judge O'Donnell (as he then was) said a pragmatic approach must be taken to the date of accrual of such claims.

What should financial planners take from this case?

8.12 Financial planners should be aware of the six-year time limit on tort claims. However they should note that that they are not absolved of all liability once six years have passed since they provided advice or made an investment on their client's behalf, rather, courts will look at when the actual loss is discovered – which could be significantly later in time, and start the six-year count down from then.

Pre-engagement considerations

8.13 Before providing services to clients, it is imperative for financial planners to define the terms of their engagement which sets out clearly and explicitly various details that will govern the relationship. A non-exhaustive list of some of these details are below:

Who is the client?	Practitioners should be crystal clear on who they are advising, for instance, is their client an individual or a limited company.
What is the scope of the engagement?	Be explicit and specific about the scope of the engagement and the duties that

	will be undertaken, for example, does an investment client wish to be additionally advised on any tax implications arising?
Disclaimer	As we have seen from the case law examined in this update, disclaimers are vital in protecting practitioners from potential claims. A sample disclaimer might look like: *"This financial advice is solely for the use only of the person to whom it is addressed. [Insert financial planner] accepts no responsibility for any third party who may use or rely on the whole or any part on this advice"*
Limitation on damages	Financial planners should ensure that there is a monetary limitation to the damages that may be payable in future successful claim clearly stated in the letter of engagement, for example, that it will not exceed €1m.

Claim management

8.14 If a financial planner does become aware of any potential exposure in connection with advice they have provided, they should immediately inform their insurance provider and consult with their legal advisors. Good and timely communication with clients can be instrumental in mitigating contentious claims.

9 CONCLUSION

9.1 In summary, we have provided a high-level overview on the basic principles of negligence and we have examined each element of the tort: duty of care, breach of duty, damage and causation.

9.2 With the negligence groundwork laid, we moved on to examine the type of negligence that a financial planner may be confronted with during the course of their career: negligent misstatement. We looked at the elements of negligent misstatement and reviewed case law to provide colour on the type of statements that may carry risk.

9.3 We looked at the standard of care that the courts will typically hold professionals, including financial planners to. We also provided a brief overview of vicarious liability and how that might impact financial planners who employ others in the course of their business. Lastly, we looked at some practical factors that financial planners should be aware of when engaging with clients.