18 Legal Aspects

18.1 Introduction

Liability for negligence has become a matter of great importance to all members of the building professions in recent years. Until about 1960 the law of tort (or delict as it is known in Scotland) remained fairly static, but during the past 35 years the various categories of negligence have been greatly extended by the courts.

This chapter is written to provide surveyors with some guidance on points of law concerning professional negligence. The following items are not a substitute for professional legal advice when complex problems arise, but are written to make the surveyor aware of the legal ramifications. We now live in a state of rapid change, not only in building techniques, but also in legislation. Building faults are continually being reported and journalists in the national press frequently report the public awareness of these problems. This is partly because of the increase in the number of property owners and also the government trend towards greater consumer protection. The public is entitled to protection, and if necessary recourse to law. The purchaser of a property will naturally seek legal advice and will wish to sue the surveyor if he or she is negligent and fails to detect structural defects or other significant problems (e.g. dampness). This usually means financial compensation.

The conduct of a surveyor may result in negligence if their performance falls below the required standard of care. However, a surveyor, like any other professional person, is neither expected to be an expert nor perfect. The standard required is that of an ordinary skilled surveyor exercising reasonable care – i.e. the norm in the surveying profession.

18.2 Negligence defined

Negligence is a tort or civil wrong of particular importance to surveyors. It is the failure to exercise the degree of care that the circumstances demand and is separate and distinct from the law of contract (see Section 1.10 'Contracts and fees'). What amounts to negligence will depend upon the facts of each particular case

Building Surveys and Reports, 4th Edition James Douglas and Edward A. Noy
 ISBN: 978-1-405-19761-8

and can be defined as a breach of legal duty to take care which results in damage to the plaintiff. The duty of care arises independently of any contractual relationship. In order to decide whether a defendant has been negligent the plaintiff must prove that:

(1) The defendant owed to the plaintiff a 'duty of care'. This is an area of particular importance in building disputes. The courts now have many cases to guide them in deciding whether there is a duty of care (see Section 18.11).
(2) The defendant was in breach of that duty. This is of central importance in all negligence litigation.
(3) The plaintiff has suffered loss or damage as a result of a breach of duty by the defendant. The plaintiff will usually be entitled to recover damages, the object being to provide recompense by money for the wrong that has been done.

18.3 Duty of care

The duty to take care has been defined by Lord Atkin in the celebrated case of the snail in the ginger beer bottle, *Donoghue* v. *Stevenson* (1932):

> 'You must take reasonable care to avoid acts or omissions which you reasonably foresee would be likely to injure your neighbour. Who in law is my neighbour? The answer seems to be the persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called into question.' (1932) AC 605–623.

What is reasonable care will vary with the circumstances. Clearly the seriousness of the potential damage that a mistake may cause must be taken into account. The likelihood of injury must also be taken into account if there is a probability of something going wrong, and great care must be taken to avoid any injury to a person or persons.

However, if a surveyor can show that he or she acted in accordance with the generally approved practices of the profession he or she will be likely to have discharged their duty of care. The important issue is not what the surveyor actually foresaw but what he or she ought reasonably to have foreseen. A typical case concerning negligence, *Daisley* v. *B.S. Hall & Co* (1972) is quoted below:

> 'The surveyor was held to have been negligent in failing to report to his client (the plaintiff) the risk created by the combination of poplar trees growing nearby and the clay sub-soil, where certain signs and cracks indicating shrinkage were already discernible in the house that the plaintiff was intending to purchase.' (1972) 225 EG 1553.

The court has to decide in each individual case whether or not there has been professional negligence and the principle that the courts usually adopt is that, if there are suspicious signs or visual evidence of any defects, then it is the surveyor's duty to have parts of the structure opened up for examination.

18.4 Breach of duty

As mentioned in Section 18.2 the issue of 'breach of duty' is of great importance, because the question that must be asked is whether the defendant was in fact negligent and therefore liable in tort. The text of what constitutes a breach of duty is illustrated by the often cited dictum of Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.* (1856).

> 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Thus the standard is objective and impersonal. Furthermore, where anyone is engaged in a trade or profession and holds himself out as having professional skill he will be expected to attain the normal competent professional standard. It is no defence to say that he acted to the best of his skill and ability if that falls short of the professional standard. It is not enough to do one's "incompetent best"." (1856) 11 Ex 781.

Where a person holds themself out to be a competent professional surveyor, whether they possess qualifications or not, they are implying that they are reasonably competent to carry out a building survey. This was clearly stated in *Freeman* v. *Marshall & Co.* (1966) 200 EG 777 High Court. The defendant was an unqualified estate agent, valuer and surveyor who failed to detect rising damp and wood rot in a basement. In his defence, he stated that he only had a basic understanding of building technology and structures involved in routine estate agency work. Mr Justice Lawton said (at p. 777):

> 'He had no organized course of training as a surveyor and had never passed a professional examination in surveying. He was a member of the Valuers Institution through election, not by examination. In fairness to him, he claimed only to have a working knowledge of structures from the point of view of buying and selling, but if he held himself out in practice as a surveyor he must be deemed to have the skills of a surveyor and be adjudged upon them.'

In summary: the plaintiff engaged the surveyor on account of his special technical skill, and it is implicit in law that he will display such skill. It is no defence to say that he was very inexperienced.

In all cases of negligence where a breach of duty is concerned it is for the plaintiff to establish what actually happened, and what can reasonably be expected

from the defendant. Proving what actually happened is not an easy task when bringing an action against a professional adviser.

The plaintiff will undoubtedly take legal advice and consult other experts in building matters to discover whether the original survey fell below the recognised professional standard. The onus lies with the plaintiff to prove that the defects were in existence at the time of the original survey.

It must also be remembered that a surveyor is expected to keep up-to-date with current research. The professional standards to be applied are those currently prevailing, not those when the surveyor qualified.

18.5 Damages

The third element in the tort of negligence is damages. This simply means financial compensation for the wrong that has been done. It is essential for the plaintiff to establish not just the fact of damage, but to prove that, but for the breach of duty, the damage would not have occurred.

As a general rule the courts will award damages on the basis of the cost of the repair work necessary to put the plaintiff back in the position they would be in if the tort of breach of contract had not been committed. In some cases the loss is purely financial and is known as 'economic loss' but this rarely occurs in connection with building surveys. The considered view is that economic loss which is not due to damage to persons or property is not usually recoverable. In the case of *SCM (United Kingdom) Limited* v. *W. J. Whittall & Son Limited* (1970) Lord Denning MR stated:

> 'In actions of negligence, when the plaintiff has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. Although the defendants owed the plaintiffs a duty of care, that did not mean the additional economic loss which was not consequent on the material damage suffered by the plaintiffs would also be recoverable.'

18.6 Accuracy of estimates

In certain circumstances there is a duty not to make false statements which may cause financial damage. This will be particularly important to a surveyor when presenting an estimate to the client in respect of repairs required to a property. It must be clearly understood that the term 'approximate estimate' implies that the estimate is not exact but is the probable cost of carrying out the repairs. The estimate must give the client some reasonable idea of the expenditure to which they will be committed if they decide to purchase the property.

If the surveyor's estimate is too far out he or she could be liable for negligence. Occasionally, the client will require a 'firm quotation'. If the surveyor is unable to

carry out this service with complete confidence it is advisable to employ a competent estimating surveyor, and pay the fee for this service.

18.7 Brief reports

The surveyor must be particularly vigilant when the client says he or she only requires a general opinion and not a detailed examination. This happens when a client is anxious to purchase the property and expects the surveyor to give a 'quick answer'. This may lead to wrong conclusions and provide subsequent trouble to all parties concerned. In such cases the surveyor still has a responsibility to discover serious defects and can be sued for negligence if the defects are not correctly reported. When submitting the report the surveyor should clearly state that he or she has not had an opportunity to examine the building in detail and cannot be absolutely sure that there are no hidden defects. Thus in the case of *Sincock* v. *Bangs, Reading* [1952] CPL 562, the architect was instructed to inspect a farm and to give a general opinion and not to make a detailed survey. The architect was held to be negligent in not discovering dry rot, woodworm and settlement.

18.8 Parties in tort

All partners in a professional firm are liable for a tort committed by a partner or an employee during the course of employment. Partners cannot say that a mistake was made by one of their assistants and exonerate themselves from blame. This is known as 'vicarious liability'. Thus it follows that in the case of an employee surveyor carrying out a building survey by a professional partnership, the partnership will be responsible for the torts committed by their surveyor provided the torts were committed during the course of the surveyor's employment. Furthermore, where an employee is instructed to carry out a survey and he or she is negligent in the work, then the employer and employee will be liable in respect of that negligence. The plaintiff in such circumstances can sue the employee, or both.

In the case of *Lister* v. *Romford Ice and Cold Storage Co. Ltd* (1957) the House of Lords held that employees have a duty to perform their work with reasonable care and skill, but if they are negligent and cause their employers to be 'vicariously liable' for their tort they can be liable in damages to their employers for breach of contract. Surveyors are also liable for their actions in recommending any specialist. If the surveyor has not taken reasonable steps to check their competence and the client suffers damage as a result, the surveyor is liable for his or her own negligence in failing to discover that the firm was incompetent. However, if the surveyor recommends a specialist whom he or she considers to be fully competent, but who subsequently carries out the work badly, the surveyor is not liable.

18.9 Type of survey required

At this stage it is necessary to emphasise the difference between a building survey and a valuation survey. As previously stated, in their examination building surveyors look to see if the structure is sound and, if not, report faults and suggest remedies.

The valuation of a property involves a fairly superficial inspection in order to estimate what it is likely to be worth, taking into consideration its location, amenities and facilities, etc. The fee paid relates to the relatively shorter time spent on this assessment. There is, however, still uncertainty among the public as to what such an inspection should involve. Many homebuyers, even some solicitors, believe when they have received a mortgage valuation that the property must be in reasonable condition to warrant the building society's offer, and therefore a building survey is not necessary. From the evidence of reported cases it has been proved that a homebuyers survey and valuation (Scheme 2 survey), if not a full building survey (Scheme 3 survey), is necessary, as is demonstrated by the cases described in Section 18.11.

18.10 Professional negligence relating to surveying buildings

As indicated above, the basic principle of negligence rests upon breach of duty of care. Negligence in relation to inspecting and surveying buildings usually relates to one or more of the following deficiencies on the surveyor's part.

Failure to carry out instructions

For example, this could relate to not addressing the client's requirements as articulated in the letter confirming instructions.

Failure to make sufficient enquiries

This might be failure to consult local authority records or omitting other checks on the property as regards ownership, easements, etc. – particularly at the desk-top stage.

Inadequate level of knowledge, skill or experience

Recognising the limits of one's own competency is a skill in itself.

Failure to inspect properly

This might be the result of the survey being undertaken in a hasty, superficial or partial manner – as evidenced by incomplete or incorrect guidance to the client contained in the report. Typical examples of this are:

- Failure to inspect particular parts (e.g. roof space, subfloor void).
- Failure to uncover or open up (e.g. hatches providing access to ducts and other hidden spaces).
- Failure to observe (e.g. to note anomalies or other adverse changes in construction).
- Limited survey (e.g. restricted to exterior).
- Failure to recognise/diagnose (e.g. mistaking condensation for rising dampness).

Inadequate report

This might be a poorly presented report or, even worse, a report that is badly written or inadequately formatted and fails to comply with the criteria described in the Chapter 17.

18.11 Recent negligence cases

Many of the negligence cases that have come before the courts during the past 20 years are concerned with valuation surveys for mortgage purposes. The following cases questioned the previously accepted view of the valuation reports prepared by surveyors acting for building societies.

(1) *Yianni* v. *Edwin Evans & Sons* [1982] 1 QB 438.

This case concerned a report prepared by a valuer acting for a building society when a prospective purchaser applied for a loan. The mortgagee asked the defendant to value the property. The property was valued at £15 000 and the plaintiff accepted the building society's offer. Some years later cracks appeared in the structure due to settlement and the cost to put the building into a good state of repair was £18 000. The plaintiff claimed damages against the defendants on the basis that they had been negligent. The matter at issue was whether the surveyor making a valuation for a building society was under a 'duty of care' to the purchaser. The High Court decided that they were, even though there was not a contract between them and the plaintiff.

(2) *Smith* v. *Eric S. Bush* and *Harris* v. *Wyre Forest District Council* (1989) 17 EG 68.

In April 1989 these cases both came before the House of Lords. Both cases concerned valuation surveys where the valuer had failed to detect and advise on the extent of the structural defects. The two appeals, although different in detail, gave rise to three questions, namely:

- Whether the valuer who was asked to value the property for mortgage purposes owed the prospective purchaser a duty to exercise reasonable care and skill.
- Whether the disclaimer notice which seeks to remove all liability was valid under the terms of the Unfair Contract Terms Act 1977. This Act is of great importance

and considers disclaimers in considerable detail and operates in tort as well as in contract. Surveyors should make themselves familiar with its contents.

- Whether the disclaimer satisfied the requirements of reasonableness.

The decisions handed down by the House of Lords in 1989 have clarified the principles first laid down in *Yianni* v. *Edwin Evans & Sons*, namely that a surveyor carrying out a valuation of a property can be sued for negligence by both the mortgagee and the purchaser if he or she negligently made significant errors in his or her report. In the *Smith* and *Harris* cases it was held that the disclaimers were invalid because of the Unfair Contract Terms Act 1977. As can be seen from the above mentioned cases surveyors are very much at risk from the ongoing and undoubted liability that exists for careless statements that can lead to law suits.

(3) *Merrett* v. *Babb* (2001) EGCS 20.

This was a controversial case, which was funded by the RICS when it went to the Court of Appeal. It concerned a claim of alleged professional negligence relating to a mortgage valuation survey. The outcome was that although the defendant surveyor was an employee, he personally owed a duty to the claimant (Glover, 2008).

(4) Other important cases

It is beyond the scope of this book to consider in detail those who could be a party to an action in tort. However, if the reader requires further information on the development of tort in respect of property surveys, the history of the following cases, listed in chronological order, should help:

- *Morgan* v. *Perry* (1973) 229 EG 1737 (High Court).
- *Fryer* v. *Bunney* (1982) 263 EG 158 (High Court).
- *Perry* v. *Sydney Phillips & Son* (1982) 1 WLR 1297 (Court of Appeal).
- *Bolton* v. *Puley* (1982) 267 EG 1160 (High Court).
- *Howard* v. *Horne & Sons* (1989) 5 PN 136 (High Court).
- *Watts and Another* v. *Morrow* (1991) 14 EG 111 (High Court).

For further details of these and other cases see the works by Maltz (2001), Murdoch (2002) and Powell and Stewart (2002).

18.12 Disclaimers and limitation periods

During recent years it has become the custom to insert a disclaimer notice in both building and valuation surveys stating the inability of the surveyor to report on any part of the structure which is inaccessible, covered or unexposed. Generally

speaking, the courts do not like disclaimers, particularly the sweeping type used by some building societies and valuers which seek to remove all liability.

In the cases of *Smith* v. *Eric S. Bush* and *Harris* v. *Wyre Forest District Council* their Lordships criticised valuers, building societies and other lending institutions for seeking to avoid liability by sweeping disclaimers. However, it would appear that limitation clauses which inform the purchaser of the extent of the examination are acceptable, and surveyors should make this clear in their reports. The House of Lords also stated that a valuation surveyor owes the purchaser a 'duty of care'. It is likely that no disclaimer clause can completely absolve the duty of care and any clause which limits that duty or liability can only be applied to the extent that it is fair and reasonable. Obviously this is rather a grey area with wide ranging implications for liability and the circumstances in each will determine the validity of a disclaimer notice.

Different types of surveys will obviously serve different functions, and will in some cases affect the standard of care. In the writer's view the surveyor should make clear at the outset what the purpose of the survey has been and the extent of the responsibility which he or she is prepared to accept. It is clear that the profession needs some guidelines concerning valuation surveys stating what level of inspection the survey should provide, and what can be done to ensure that the purchaser of the property knows the extent of the inspection. It is advantageous to both parties in a litigious situation if they have both recorded their rights and liabilities. Each party should know precisely what is required of them and any limitations should be stated so that it would be clearly understood whether or not obligations have been complied with.

The period after which the injured party is prevented from pursuing a surveyor for breach of contract or negligence has now been determined by statute. The Limitation Act 1980 specifies a limitation of actions as follows:

- A claim under an oral or written contract will be statute barred 6 years after the time when the cause of action accrued (section 5).
- A claim in tort will be statute barred 6 years from the accrual of the cause of action (section 2).
- A claim in contract under seal will be statute barred 12 years from the time when the cause of action accrues (section 8).

The legal view is that the defendant who has committed a negligent act should not have the possibility of legal action hanging over him forever, and at the same time the plaintiff who has been injured by a wrong should not delay in presenting his case.

On the 29 November 1984, the Law Reform Committee published a report on latent damage. This report concluded that there were certain sections in the Limitation Act 1980 which might give rise to uncertainty. This could cause injustice to both defendants and plaintiffs where the issue is when the damage occurs

and this could give rise to a problem. The Committee's recommendations resulted in the Latent Damage Act 1986. Its main provisions are:

(1) The basic claim period is still 6 years from the date on which the cause accrued.
or
(2) Three years from the 'starting date' if that is later. The 'starting date' is the earliest date on which the plaintiff had or could reasonably have had knowledge of the facts about the damage.
(3) The Act created a 15-year 'long stop' which runs from the date of the breach of duty on which the negligent act occurred. (This is also in section 14B of the Limitation Act 1980.) The 'long stop' provision protects the defendant in the long term. It is important to remember that the 'long stop' provision can expire before the other two periods mentioned above, and that all three periods run from different starting dates.

This is an area of law where the fixing of dates can be a complex matter. Even the simplest case can give rise to difficulties. Capper (1987) discusses many of the problems of latent damages.

18.13 Trespass

Trespass is a long established tort and occurs where there is direct interference with the plaintiff's goods or land by another. As a general rule it is not a criminal offence (as opposed to mass trespass, which is) and only gives rise to civil action. As far as the surveyor is concerned it will arise from entering on to the land owned by the vendor. The mere entry on to another person's land, without actual or implied consent, is technically a trespass. When a surveyor receives instructions from a client to carry out a building survey this normally includes permission to enter the property. Despite this, it is advisable for the surveyor to obtain permission from both owner and tenant and adjoining owners and tenants. This permission is particularly important when carrying out a drain test or the inspection of boundary walls which may involve walking over the property of others.

18.14 Party structures

Party structures are those wall, fence and floor elements that separate properties of different owners (Watt, 2007). The Party Wall etc. Act 1996 controls the procedures relating to party structures in England and Wales (Chynoweth, 2003; Party Wall Guidance Note Working Group, 2003). Common law applies to party wall matters in Scotland (Melville & Gordon, 1992).

Surveyors inspecting a dwelling will have to consider any party structure implications for their clients. This is particularly the case with flats, semi-detached or terraced dwellings (see Anstey 1998, 2000). Common repairs, conversions and other adaptations to party structures affecting neighbours are typical issues that surveyors need to consider in such instances (Melville & Gordon, 1992).

18.15 Indemnity insurance

As indicated earlier, it is a mandatory requirement of being a chartered surveyor to have an appropriate level of professional indemnity cover. This form of insurance covers the surveyor against clients' claims (legitimate or otherwise) of negligence. Undertaking building survey work is one of the most onerous activities that any construction professional can undertake. Compared to many other professional commissions, the risks are high whilst the financial rewards are low with this type of work.

It is advisable for all surveyors to protect themselves against claims based on alleged neglect, omission, or error when acting in a professional capacity. Damages for all types of claims have increased over the past 20 years and will no doubt go on rising. Indemnity policies are mandatory with some professional bodies and partly so in others and cover the damages and legal costs incurred in cases of negligence.

It is advisable for the surveyor to obtain the services of a reputable insurance broker specialising in such insurance who will give advice with regard to the various types of policies available. The usual procedure is for the surveyor to complete a proposal form which is the basis of the insurance contract. If all the material facts are not disclosed, the surveyor may find that the insurer can lawfully refuse to settle a claim because of this non-disclosure. This applies to facts which the surveyor knows, even though the insurer may not have asked the relevant questions. It follows that the surveyor will only be covered for liability that falls within the description of the cover in the policy. It is well to remember that insurers can refuse to deal with a claim that is not properly presented in accordance with the terms of the policy.

Considering the claims that may arise against surveyors for some omission in their reports, they must not disregard the inflationary effects when arranging adequate insurance cover and the fact that this could increase their overheads. It must also be remembered that insurance cover should be continued when a surveyor retires since claims may still be made in respect of negligence during the period he or she was in practice. Claims may be made for as long as the law of limitation of action allows (see Section 18.11). Legal advice should be sought as to the length of time for which insurance cover should be maintained.

18.16 Property claims

Legal disrepair and statutory nuisance claims concerning landed property are covered mainly under the following statutes:

- Building Act 1984 sections 77–79.
- Landlord and Tenant Act 1985 section 11.
- Environmental Protection Act 1990 sections 79–82.
- Defective Premises Act 1972 section 4.
- Housing Act 1999 section 604.