

INDEX

accountants and actuaries

- contract, breach of, 157
- damages, assessment, 159
- duties owed to third parties, 67-68
- fiduciary duty, breach of, 157-159
- liability, generally, 149
- negligence
 - duty of care, 151-154
 - generally, 149-151
 - reliance/causation, 157
 - standard of care, 154-156

accounting of profits, 93

affidavit of documents, 139-140

Anns v. Merton London Borough Council

- duty of care, generally, 8-9
- lawyers, duties owed to related third parties, 65
- negligence, 152
- negligent misrepresentation, duty of care, 41

architects

- duty of care, 182-183, 184-185
- generally, 181
- standard of care
 - boundaries of standard, 186-187
 - evidence and, 187-188
 - generally, 186
 - legislation and regulatory oversight, 187

BG Checo International Ltd. v. British Columbia Hydro & Power Authority

- concurrent liability explained in, 28
- defences in contract, 102
- recovery and concurrent liability, 29

but-for test, 21-23

causation

- accountants and actuaries, negligence, 157
- but-for test, 21-22
- factual causation
 - but for test, 21-22
 - material contribution test, 22-23
 - multiple-cause cases, apportioning liability, 24-25
 - proof establishing, 23-24
 - test to be applied, 23
- gross negligence, 26
- legal causation
 - test, 25
 - thin skull rule, 25-26
- material contribution test, 22-23
- multiple-cause cases, apportioning liability, 24-25

cause of action, elements of

- contract, breach of, 30-34
- damages caused by professional's conduct, 21-26
- duty of care, 8-13
- fiduciary duty, breach of, 55-57
- generally, 7-8
- negligent misrepresentation, 40-44
- standard of care, breach, 13-21
- unjust enrichment, 49-51

Code of Ethics and Standards of Business Practice, standard of care of real estate agents, 187

co-defendants, allocating liability between

- concurrent tortfeasors, 72-73
- generally, 71-72
- successive tortfeasors, 72

concurrent liability

- generally, 28-29
- limitation of through contract, 28
- recovery and, 29

concurrent tortfeasors, 72-73

Index

constructive trust, 92-93

contract

- breach, accountants and actuaries, 157
- cause of action, elements, 30-34
- claimant under contract, 34-36
- concurrent liability, 28-29
- damages, 36-37, 78
- defences
 - contributory negligence, 37-38
 - limitation of liability clauses, 37
- examples of claims against professional, 38-40
- professional legal relationship, in, 29-30
- third parties to, 63-71

contributory negligence defence

- contract, breach of, 103-104
- generally, 97-99
- negligent misrepresentation, 45-46
- professional contracts, 37-38

crumbling skull doctrine, 26

damages

- assessment, liability of accountants and actuaries, 159
- caused by professional's conduct, 21-26
- contract, 36-37, 78
- equity, in, 79-80
- fiduciary duty, breach of, 58-59
- financial advisor's negligence, losses related to, 177-179
- lawyer's negligence, losses related to, 86-87, 167-169
- negligent misrepresentation, 44
- personal injury, 87
- professional negligence, 78-79
- quantification of damages, 85
- real estate, losses related to, 85-86
- types of
 - aggravated and exemplary or punitive damages, 81
 - aggravated damages, 81-82

- exemplary or punitive damages, 82-84
- general and special damages, 80-81
- nominal damages, 84-85
- unjust enrichment, 52

defences

- contract
 - contributory negligence, 103-104
 - generally, 37-38, 102
 - limitation/exclusion of liability, 102-103
- contributory negligence, 97-99, 103-104
- fiduciary duty, breach of, 58
- financial advisors, 174-177
- illegality, 101-102
- limitation periods, 95-97
- negligent misrepresentation
 - contributory negligence, 45-46
 - illegality, 46
- voluntary assumption of risk, 47, 100-101
- unjust enrichment, 51-52

discovery

- discovery plan, 138
- documentary discovery, 138-143
 - non-parties
 - examination of, 146-147
 - production from, 147
 - ongoing obligations, 146
- oral discovery, 143-146
- purpose, 137-138
- questions for discovery of defendant, 148
- topics for discovery of plaintiff, 147-148

discovery plan, 138

documentary discovery

- affidavit of documents, 139-140
- electronic discovery, 140
- gathering documents, 139
- privilege, 140-141

Index

- “to do” list for client, 142-143
 - “to do” list for counsel, 141-142
- duty of care**
- accountants and actuaries, 151-154
 - financial advisors, 171-172
 - generally, 8-9
 - lawyers, 161-164
 - negligent misrepresentation, 41-42
 - neighbourhood principle, 8-9
 - professional employees, liability of, 13
 - standard of care, breach, 13-21
 - third parties as defendants, 11-12
 - third parties as plaintiffs, 9-11
 - vicarious liability, 11-12
- employers and employees**
- independent liability, 71
 - vicarious liability
 - generally, 11-12, 68
 - whether to impose, 69-71
 - whether relationship exists, 69
- engineers**
- duty of care, 183-185
 - standard of care
 - boundaries of standard, 186-187
 - evidence and, 187-188
 - generally, 186
 - legislation and regulatory oversight, 187
- ex turpi causa non oritur action (illegality)**
- generally, 101-102
 - negligent misrepresentation, 46
 - unjust enrichment, 53
- fiduciary duty, breach of**
- accountants and actuaries, 157-159
 - damages, 58-59
 - defences, 58
 - elements of action, 55-57
 - examples, 59-61
 - *Frame v. Smith*, test for finding fiduciary relationship, 56
 - professional relationships involving duty, 57-58
- financial advisors**
- causes of action beyond negligence, 179-180
 - damages, 177-179
 - defences
 - causation, failure to prove, 175
 - contributory negligence, 176-177
 - failure to mitigate, 177
 - ratification for stock brokers, 175-176
 - duty of care, 171-172
 - generally, 171
 - know your client rule, liability arising from, 173
 - New Client Account Form, negligence arising from failure to complete, 173
 - standard of care, 172-174
- Frame v. Smith*, test for finding fiduciary relationship, 56**
- gross negligence, 26**
- Haig v. Bamford***
- accountants, duties owed by, 67
 - third parties as plaintiffs, duty of care owed, 10
 - negligent misrepresentation, potential claimants, 45
- Hedley Byrne & Co. v. Heller & Partners Ltd.***
- analysis, five-element test, 40-41
 - doctrine of negligence expanded, 40
 - lawyers, duties owed by, 64
- Hercules Management Ltd. v. Ernst & Young***
- accountants, duties owed by, 67, 151-154
 - negligent misrepresentation, cause of action, 41-45
 - third parties

Index

- duty of care to, 9-10
 - third parties to contract, 67
- Hodgkinson v. Simms**
- damages in, 178
 - fiduciary duty, breach of, 157-158
- illegality as defence**
- generally, 101-102
 - negligent misrepresentation, 46
 - unjust enrichment, 53
- indeterminate liability, 9-10, 40, 42, 45, 67, 90, 152, 153**
- industry custom, relationship between professional negligence, statutory standards and, 19-20**
- insurance, professional liability**
- coverage, 73-74
 - notice requirements, 74-75
- know your client rule, stock brokers, 173**
- laches, doctrine of, 58**
- Law Society of Upper Canada Rules of Professional Conduct, 164-165, 167**
- lawyers**
- causation and damages, 167-168
 - costs and damages, 168-169
 - disclaimers, 167
 - duty of care
 - clients, to, 162
 - generally, 161
 - related third parties, to, 64-66
 - third parties not owed duty, 163
 - third parties, to, 162-164
 - remoteness, 168
 - Rules of Professional Conduct, Law Society of Upper Canada, 164-165, 167
 - standard of care, 164-167
- legal causation**
- test, 25
- thin skull rule, 25-26
- legislation and regulatory oversight, standard of care and, 187**
- liability**
- apportioning liability in multiple-cause cases, 24-25, 71-73
 - civil compared to regulatory and criminal liability, 3-4
 - concurrent, 28-29
 - contracts, under, 29-36
 - criminal liability, 4
 - independent, 71
 - indeterminate, 9-10, 40, 42, 45, 67, 90, 152, 153
 - insurance, 73-75
 - limitation clauses, 30, 37
 - professional employees, of, 13
 - professional liability compared to professional negligence, 4-5
 - vicarious
 - employers and employees, 68-71
 - third parties as defendants, 11-12
- material contribution test, 22-23**
- McAlister (Donoghue) v. Stevenson, origins of duty of care, 8**
- mitigation**
- financial advisors, claims against, 177
 - obligation of plaintiff, 87-89
- multiple-cause cases, apportioning liability, 24-25**
- negligence**
- accountants and actuaries, 149-157
 - gross, 26
 - presumption of, 14-15
- negligent misrepresentation**
- cause of action, elements, 40-44
 - claimants, potential, 45
 - concurrent liability, 28-29
 - damages, 44

Index

- defences, 45-47
 - examples of claims against professional, 47-49
- neighbourhood principle, 8-9**
- Nielsen v. Kamloops (City)*
- *Ames* test adopted in, 9
 - duty of care, whether owed, 41, 151
- oral discovery**
- conduct of examination, 144
 - generally, 143
 - preparation, 143-144
 - role of counsel, 145-146
 - undertakings, 145
- pleadings in professional negligence action**
- checklist, 105-106
 - drafting tips, 108
 - examples of pleadings, 109-136
 - “To Do” List for client after initial interview, 107-108
 - “To Do” List for lawyer after initial interview, 106-107
- professional**
- acting as, 3
 - definition, 1-3
 - liability, civil, 3-4
 - liability, criminal, 3-4
 - liability, regulatory, 3-4
 - professional liability vs. professional negligence, 4-5
- professional employees, liability of, 13**
- professional liability insurance, 73-75**
- professional liability vs. professional negligence, 4-5**
- pure economic loss, 89-90**
- Queen v. Cognos Inc.*
- accountants, duties owed to third parties, 68, 150
- duty not confined to “professionals”, 43
 - five-element test to establish negligent misrepresentation outlined, 40-41
 - reasonable reliance, 44
 - standard of care, 44
 - untrue, inaccurate or misleading statement, 43
- real estate agents**
- Code of Ethics and Standards of Business Practice, 187
 - duty of care, 184
 - standard of care
 - boundaries of standard, 186-187
 - evidence and, 187-188
 - generally, 186
 - legislation and regulatory oversight, 187
- reasonable reliance, test in *Queen v. Cognos Inc.*, 42-43, 44**
- recovery and concurrent liability, 29**
- reliance**
- accountants and actuaries, negligence, 157
 - damages resulting from, 44
 - foreseeable/reasonable, 42-43, 44
 - higher standard imposed on professionals/specialists, 18
 - *Queen v. Cognos Inc.*, five-element test for negligent misrepresentation, 40-41
- remedies**
- accounting of profits, 93
 - constructive trust, 92-93
 - damages, types of
 - aggravated damages, 81-82
 - aggravated and exemplary or punitive damages, 81
 - exemplary or punitive damages, 82-84

Index

- • general and special damages, 80-81
 - • nominal damages, 84-85
 - foreseeability of harm, 89
 - lawyer's negligence, losses related to, 86-87
 - mitigation, obligation on plaintiff, 87-89
 - personal injury, 87
 - pure economic loss, 89-90
 - quantification of damages, 85
 - real estate, losses related to, 85-86
 - specific performance, 90-92
- specific performance, 90-92**
- standard of care**
- accountants, actuaries, auditors, 154-156
 - architects, 184-188
 - changes over time, 20-21
 - damages caused by professional's conduct, 21-26
 - determining standard, 16-19
 - engineers, 184-188
 - financial advisors, 172-174
 - industry custom, 19-20
 - lawyers, 164-167
 - negligence, presumption of, 14-15
 - negligent misrepresentation, 44
 - perfection as standard of care, 16
 - professional negligence actions, 15-16
 - real estate agents, 184-188
 - statutory standards, 19-20
 - two-step analysis, 13-14
- statutory standards, relationship between professional negligence, industry custom and, 19-20**
- successive tortfeasors, 72**
- thin skull rule, 25-26**
- third parties**
- co-defendants
 - • concurrent tortfeasors, 72-73
 - • generally, 71-72
 - • successive tortfeasors, 72
 - contract, to, 63-71
 - defendants, as, 11
 - insurer, professional liability, 73-75
 - plaintiffs, as, 9
 - professional employees, liability of, 13
- tort, waiver of, 54-55**
- undertakings**
- implied, not to use documents produced for other purpose, 140
 - oral discovery, 143, 145
- unjust enrichment**
- cause of action, elements, 49-51
 - damages, 53
 - defences
 - • change of position, 51-52
 - • estoppel, 52
 - • illegality, 52
 - examples of claims against professional, 53-54
- untrue, inaccurate or misleading statement, test in *Queen v. Cognos Inc.*, 43**
- vicarious liability**
- professional employees, liability of, 13
 - third parties as defendants, 11-12
- voluntary assumption of risk, defence to negligent misrepresentation, 47, 100-101**
- waiver of tort, 54-55**