

HKU-CICID-HKIE-CIOB-ACMA Seminar

Understanding the Duties and Liabilities of Construction Industry Professionals

By

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2 June 2009

Topics Covered

- Construction Industry Professionals (CIPs)
- Contractual Duties of CIPs
- What are Construction Torts
- Main Elements of a Tort
- Pure Economic Loss
- Claims by Contractors against CIPs



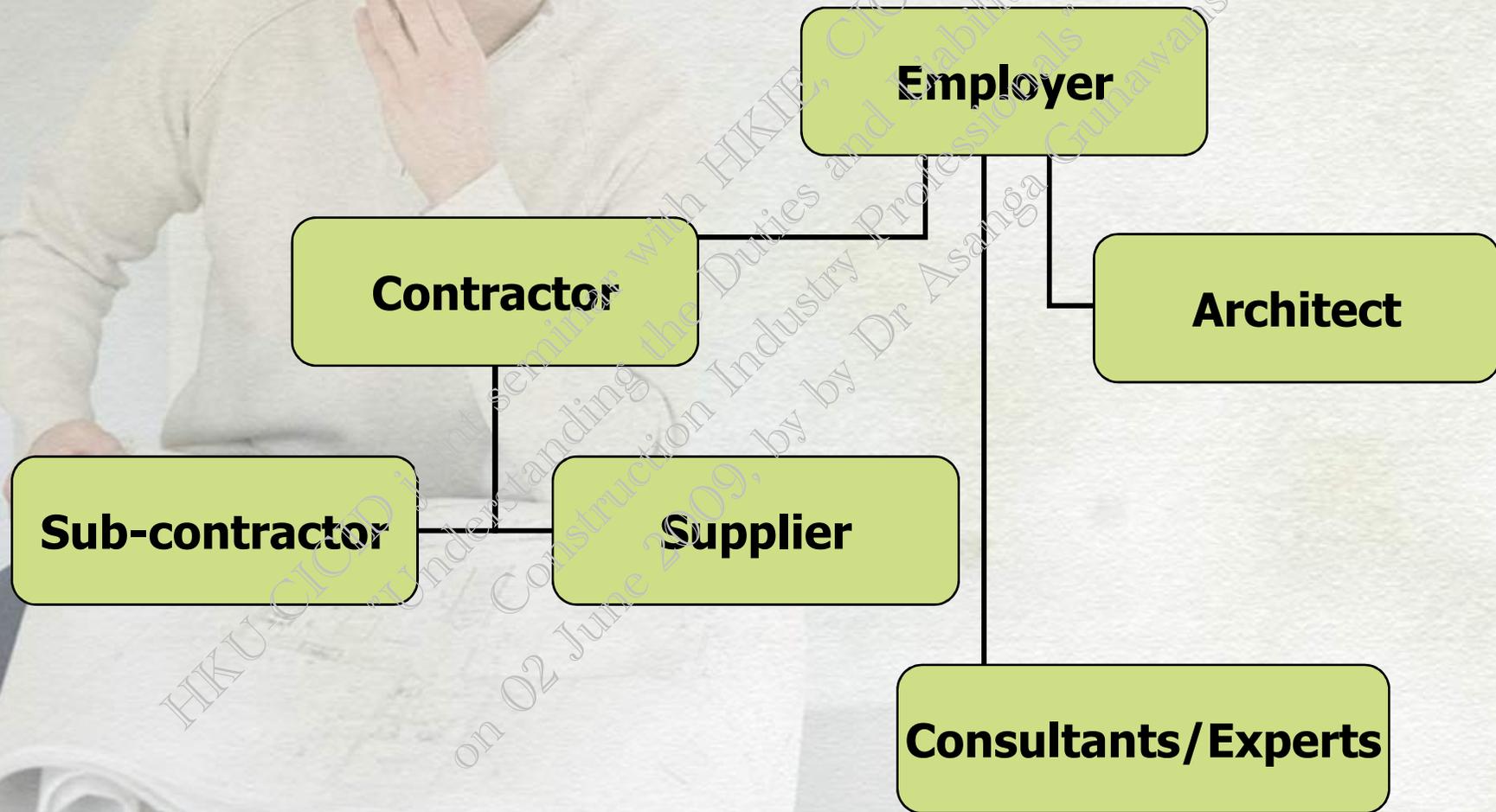
CIPs

- Professionals such as **Architects, Engineers** and **Quantity Surveyors** are hired for their services by both developers and contractors.
- There is a new breed of CIPs (e.g. Green Mark Certifiers)
- Depending on the nature of the contractual arrangement, CIPs may provide their services as **independent contractors** to developers or contractors.

Contractual Duties of CIPs

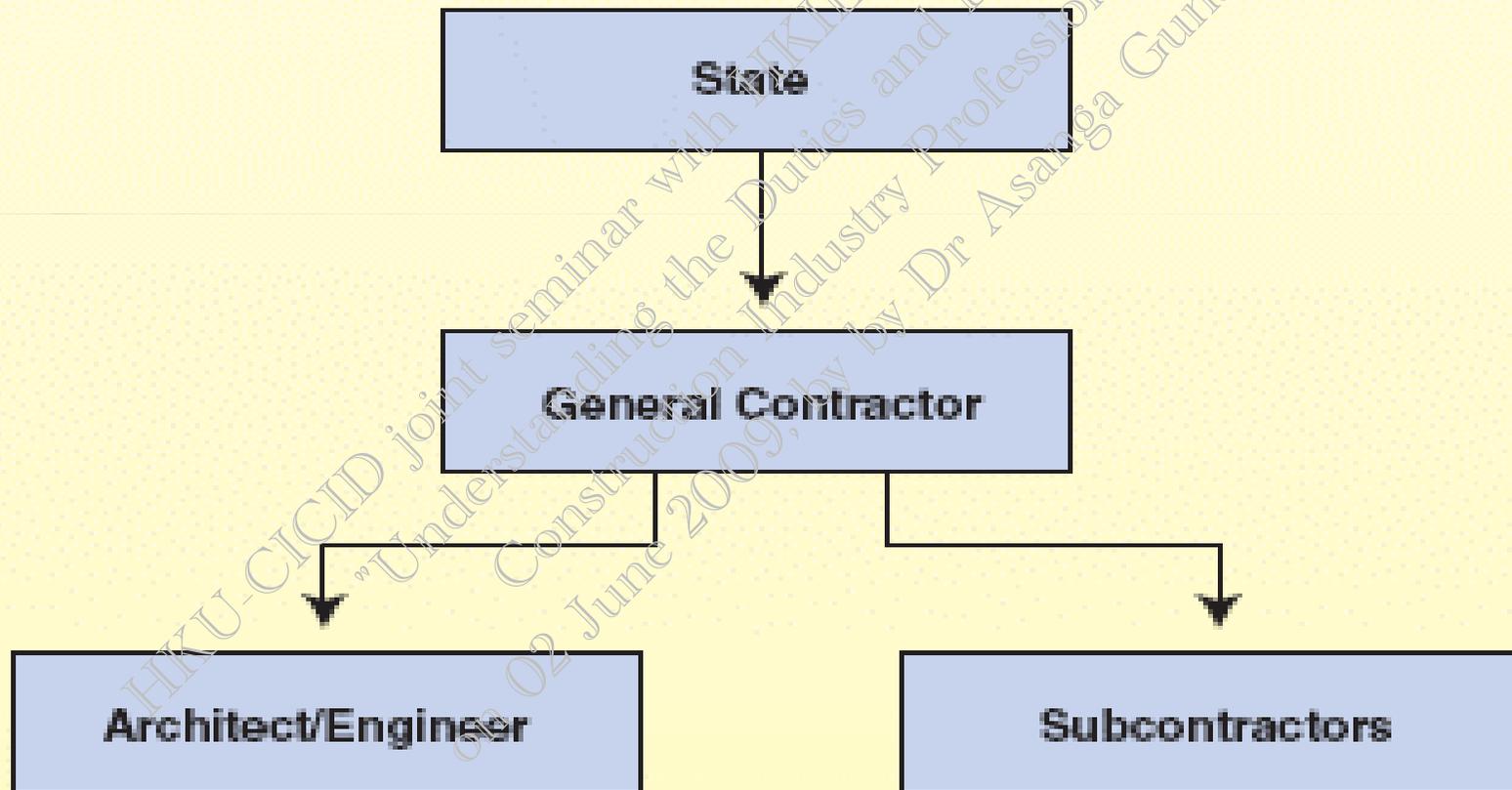
- In any contract the nature, content and consequence of which are determined and defined by the agreement between the parties.
- The starting point in any professional negligence claim is to consider whether the losses are recoverable in contract.
- When the contractual route is unavailable, then liability in tort is considered.

Traditional Construction Contracts



A Typical D&B Contract

Design-Build



Functions of the Main Consultant

- In most standard forms of contracts used in the construction industry the duties of the consultant are clearly specified.
- The Consultant is managing the project from:
 1. **Technical point of view** - he is checking to see if the works are in accordance with the specifications and with the design.
 2. **Financial point of view** – he issues interim payment certificates, variation orders, and final payment certificates, etc.
 3. **Contractual** – he checks if the parties (employer and/or contractor) comply with the contractual procedures.
 4. **In case of disagreements** - after due consultations with the Employer and Contractor, he issues determinations.

Torts

- A Tort denotes a **breach of duty imposed by law**.
- A liability that arises when that duty is breached.
- This duty is towards persons generally.
- The duty is to ensure that one's intentional or negligent acts do not cause physical or economic harm to others.
- If this duty is breached then the wrong doer would be liable to pay damages to the victim.
- **Nature of the Duty**: To act as a reasonable person exercising reasonable diligence.

Torts

- Tort exceeds the obligation of a party under contract.
- The duty owed under tort could be to the other party in a contractual relationship, *as well* as to any third party who, it is reasonably foreseeable, would get affected by the actions of a person.
- **Example:** A CIP may owe a duty towards his client as well as any other person, if it is reasonably foreseeable that such other person would suffer due to negligence of the CIP.

Main Elements of Tort

1. Wrong committed by one person;
2. Harm to another person as a result of that wrong; and
3. An appropriate relationship between the wrong and the harm (**causation**).
4. The wrongful act must be of such nature as to give rise to a legal remedy in the form of an action for damages.

Negligence and Duty of Care

Negligence as a tort requires:

- a duty to take care;
- a breach of this duty by the defendant;
- Proof that the breach caused recoverable damage.

Negligence and Duty of Care

Additional requirements:

- Foreseeability of the damage
- A sufficiently 'proximate' relationship between the parties
- It must be fair, just and reasonable to impose the duty of care on the defendant.
- Donoghue v. Stevenson [1932 AC 562(HL)].

Main Elements of Tort: Case Law Development

Donoghue v Stevenson [1932] AC 562

- Manufacturer owed a duty of care to the ultimate consumer to take reasonable care that the product was free from defect likely to cause injury to health
- Foreseeability of injury is sufficient to establish the duty of care.

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

- Foreseeability alone may be insufficient to establish a duty of care
- "special relationship"
- assumption of responsibility and known reliance.

Main Elements of Tort: Case Law Development

- *Susan Field v Barber Asia Ltd [2004] 3 HKLRD 871*
- D, an independent financial adviser, was held liable in tort for having breached duties of care owed to P, an investor.
- P was an inexperienced investor who had wished to invest conservatively.
- D had advised P to invest by borrowing in one currency and investing in another, without explaining the risks.

Susan Field v Barber Asia Ltd [2004] 3 HKLRD 871 ...

- "In general, where a defendant assumes the responsibility of providing advice to a plaintiff, and knows or ought to know that the plaintiff is likely to rely on that advice, a duty of care is likely to arise."
- "**Pertinent factors to take into account will also include** the *relative skill and knowledge of the parties*, the *context in which the advice is given*, whether the giver of the advice is doing so completely *gratuitously or is getting a reward*, ... and whether or not there are any *express disclaimers of responsibility* (which would negative any assumption of responsibility by a defendant)."

Foreseeability Principle as applied in Construction Contracts

- A designer/builder owes a duty of care to all persons who might reasonably be expected to be affected by the design/construction of the premises.
- The duty is to take reasonable care that such persons would not suffer injury as a result of the faults in the design/construction of premises.

(Anns v. London Merton Borough; Rimmers v. Liverpool Council)

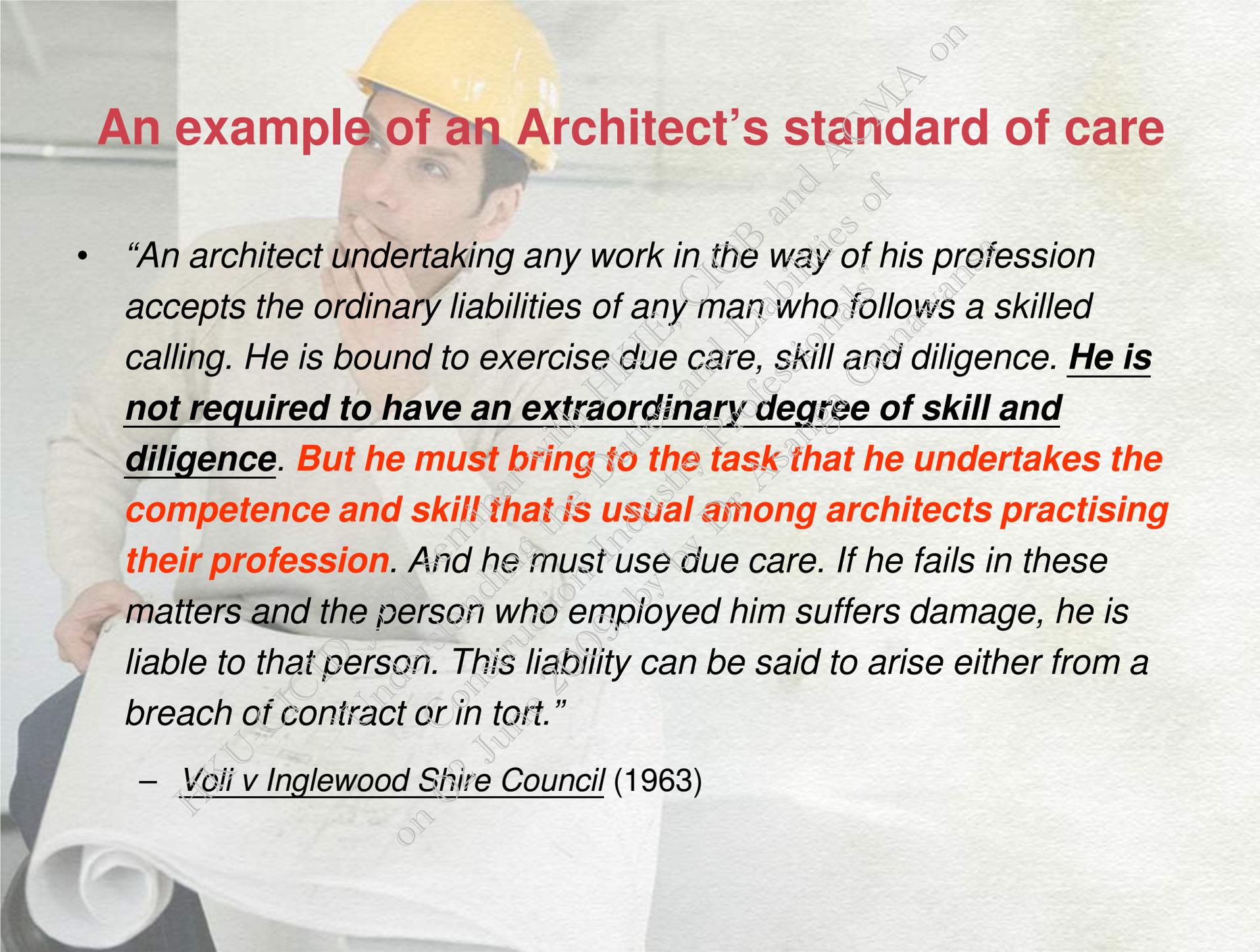
Standard of Care

- Generally, the degree of duty of care is that of an **ordinary prudent person**.
- **Exceptions:**
 - (i) if a person is highly skilled, the law would hold him guilty of negligence in failing to use his expert skill.
 - (ii) if a person holds himself out as being specifically competent to do things requiring professional skill, he will be held liable for negligence if he fails to exhibit the care and skill of an expert in that business.

What is the measure of the standard of service to be expected from a CIP?

- **Contractual** - the contract will often determine the CIPs responsibilities and liabilities.
- **Tort** – *“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 ... the standard of the ordinary skilled man exercising and professing to have that special skillhe is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of ... men skilled in that particular art.”*

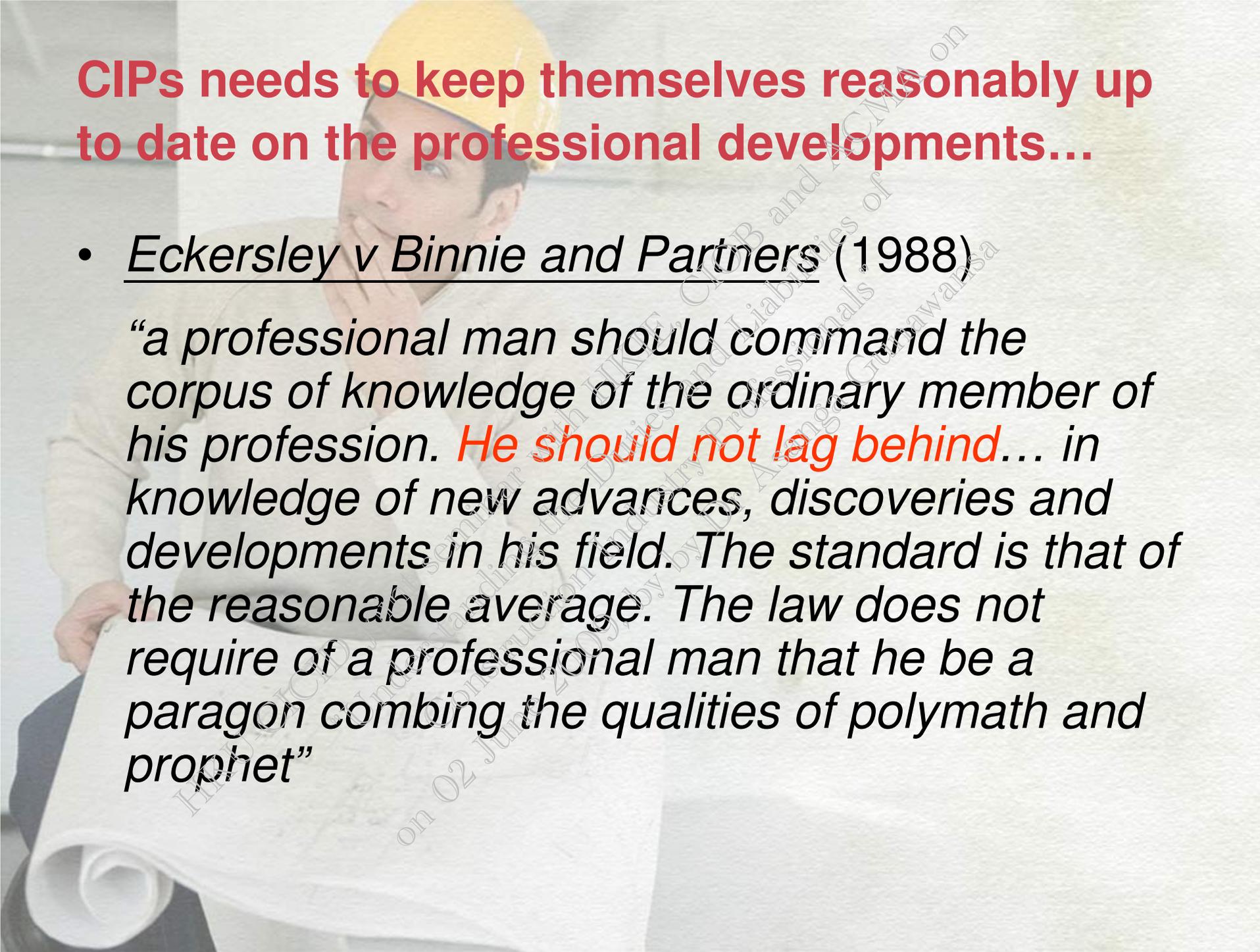
Bolam v Friern Hospital Management Committee [1957] WLR 582



An example of an Architect's standard of care

- “An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. **He is not required to have an extraordinary degree of skill and diligence.** **But he must bring to the task that he undertakes the competence and skill that is usual among architects practising their profession.** And he must use due care. If he fails in these matters and the person who employed him suffers damage, he is liable to that person. This liability can be said to arise either from a breach of contract or in tort.”

– Voli v Inglewood Shire Council (1963)



CIPs needs to keep themselves reasonably up to date on the professional developments...

- *Eckersley v Binnie and Partners* (1988)

“a professional man should command the corpus of knowledge of the ordinary member of his profession. He should not lag behind... in knowledge of new advances, discoveries and developments in his field. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet”

Knowledge of the client is Irrelevant

- Once established that an Architect owes a duty either under contract or tort to provide a service, **it is irrelevant what special skills the client may have in the same area** as the architect's responsibility to exercise reasonable skill and care is undiminished.

– *Ellison and Partners and Hamilton Associates (1986) 1 All ER*

Pure Economic Loss

- Can you recover **“pure economic loss”** (a loss that is unrelated to any physical injury but can be assessed in monetary terms)?
- An economic loss caused by a contractual breach could be claimed by suing for breach of contract.
- A physical injury or a monetary loss relating to a physical injury (e.g. repair cost of a building) due to negligence could be recovered under tort.

Pure Economic Loss

- **What if a contractor relies on an engineering report in constructing a mall and the engineering advice turns out to be incorrect, leading to additional expenditure in re-design work and delays in opening?**
- If a CIP design a faulty structure and as a result it causes death, personal injury or damage to other property, the injured party could sue the CIP for those losses in tort.
- However, If the building is simply designed or constructed badly, resulting in it losing part of its commercial value (pure economic loss), is that loss recoverable in tort?

Traditional Approach to Pure Economic Loss

- Traditionally, common law jurisdictions have taken a restrictive approach because:
 - The fear that allowing the recovery of pure economic loss would open up floodgates for such claims.
 - The belief that economic loss fall within scope of contracts and, therefore allowing claims of such losses may undermine contract law.

HKU-CICID Seminar on "Understanding the Duties and Responsibilities of Architects, Engineers, Quantity Surveyors and Construction Professionals of Hong Kong" on 02 June 2009 by Dr. Amy Chan

Key Reasons for Denying Pure Economic Loss

- Allowing pure economic loss for tort claims might lead to “a **liability in an indeterminate amount for an indeterminate time to an indeterminate class**”.
 - Cardozo C.J. in the US case of *Ultramares Corporation v Touche*, 174 N.E. 441.
- Example – The competent authority for building approvals turns down the application for a new construction. The prospective employees, suppliers, customers, contractors etc. could argue that the decision caused them economic loss.

Pure Economic Loss – English Law

Murphy v Brentwood DC [1991] AC 398 (HL):

- A local authority (defendant) failed to inspect the foundations of a building adequately. As a result, that building became dangerously unstable. The claimant, being unable to raise the money for repairs, had to sell the building at a considerable loss. Later, he sought to recover from the local authority.
- The action failed.
- **Held** - Pure economic loss is prima facie unrecoverable, unless the relationship between the claimant and the defendant can be brought within the principle of *Hedley Byrne v Heller (1963)* (Special relationship between the parties)

Pure Economic Loss – English Law

Mirant Asia Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd [2007] EWHC918(TCC)

- Arup was appointed to design structures for a power plant.
- It made certain assumptions about the foundations that were later found to be incorrect.
- After completion of the works, substantial remedial work was required.
- **Held** - Arup owed a duty of care in relation to the designs it was producing. This duty of care has been breached by failing to exercise the due skill and care.
- Where the claimant entrusted the defendant with the conduct of his affairs, and the claimant relied on the defendant to exercise due skill and care in the conduct of his affairs, the defendant will be liable for economic loss caused to the claimant as a result of negligent performance of services....

Pure Economic Loss - Australia

- **Australian courts have refused to strictly follow the Murphy test.**

Woolcock Street Investments Pty Ltd v. CDG Pty Ltd (2004) HCA 16

- A subsequent purchaser of a latently defective commercial building, claimed against the engineers for pure economic loss suffered as a consequence of negligent design/supervision during construction.
- The court considered the Plaintiff's vulnerability was a critical issue in deciding the Defendant's liability.
- Court concluded that being a commercial entity, the Plaintiff was less vulnerable than a purchaser of residential property. Plaintiff had several means of protecting itself against latent defects, e.g. through contractual warranties, or expert inspection.
- **Held** - Defendant did not owe a duty of care to Plaintiff.

Pure Economic Loss - Singapore

RSP Architects Planners & Engineers v Ocean Front Pte Ltd [1996] 1

SLR 113

- The developers of a condominium were solely responsible for maintenance and upkeep of the common property.
- A management corporation as the successors of the developers took over obligations of maintenance of common property.
- Spalling of concrete in the ceilings caused by insufficient concrete protection of the steel rebars.
- **Held** - The developers owed the management corporation a duty of care to take reasonable care in constructing the common property. **The developers knew or ought to have known that if they were negligent in the construction of the common property the resulting defects would have to be made good by the management corporation.**

Pure Economic Loss - Singapore

RSP Architects Planners & Engineers v MCST Plan No. 1075

[1999] 2 SLR 449 (“Eastern Lagoon”)

- A panel of bricks fell from the fifth storey of a condominium onto the roof of a unit in another block, causing some damage.
- The Management Corporation claimed that the defendants (RSP) were negligent in designing and supervising the construction.
- The defendants while denying liability brought a third party action against the main contractor seeking a contribution/ indemnity.
- Main contractor's asserted that the defects arose from the defendants' default and not their own.
- **Held** - there was a sufficient degree of proximity between the architects and the management corporation. Thus, the architects owed a duty to exercise reasonable care to avoid the loss sustained by the management corporation.

Pure Economic Loss - Singapore

Eastern lagoon case

- Court adopted a **“two-stage process”**:
 - whether there is sufficient degree of proximity to give rise to a duty of care; and
 - If proximity is established, whether there is any material factor or policy which precludes such duty from arising.

Pure Economic Loss - Singapore

Spandek Engineering (S) Pte Ltd v Defence Science Technology Agency [2007] SGCA 37

- Spandek sued DSTA (SO of the contract) on the basis that DSTA had been negligent and had undervalued the works causing Spandek's failure to complete due to "insufficient incentive".
- Court of Appeal held that DSTA did not owe a duty of care to Spandek because:
 - The requirement of proximity was absent - there was no reliance by Spandek on DSTA in view of the arbitration clause in the contract which entitled Spandek to seek recourse against the employer for under certification of payments.
 - **Policy considerations** weighed against the imposition of a duty of care ...

Pure Economic Loss - Singapore

Spandeck case – Single Test

- There should only be one test (two parts) for establishing a duty of care regardless of the type of loss claimed (claim for physical injury or loss as well as claims for pure economic loss):
 1. Whether there was legal proximity? (if there is legal proximity, then there is duty of care)
 2. If there is duty of care, and if that duty is breached, whether policy considerations would negate that duty?

Concluding Remarks

- **Law of negligence is not perfect. It has deficiencies.**
- According to **Sir Harry Gibbs, Chief Justice of Australia (1981-1987)**:
 - **"It favours generosity to the plaintiff at the expense (in many cases) of justice to the defendant. It deters those who provide goods and services to the public from taking risks which might be perfectly reasonable to take."**
 - "Some judges seem to strive to find a reason for finding in favour of a plaintiff, particularly if the injuries are serious, so that he or she may receive compensation. In the result, damages are sometimes awarded in cases in which a reasonable and informed person would not have thought that the defendant was at fault."

(ATSE, "Living with Risk in Our Society", Occasional Paper, June 2002)

Concluding Remarks

- Construction Contracts should be watertight to provide complete framework for liability between the parties.
- Tortious liability would therefore be limited to the category of liability to a third party.
- Badly drafted construction contracts can open tortious liability between the parties, since there can be concurrent liability under both tort and contract.

Thank you!

