

Duty of Care

A duty of care arises in the following circumstances.

1. Under the principal/agent relationship
 - a. An agent is under a common law duty to act in the best interests of the principal, which is a stronger obligation than a duty to use reasonable skill and care as it has a fiduciary element. Agency relationships abound in the insurance market. It is axiomatic that an insurance broker is the agent of the insured regardless of any duties which the broker may carry out as agent for insurers. The courts are quick to imply agency where they see an intermediary having a direct relationship with an insured, even where that agent's principal trading relationship may be an explicit agency relationship with the insurer.
 - b. Where there are sub-agents involved, the agent which is the immediate principal of the sub-agent will be responsible for any breaches committed by the sub-agent.
 - c. The contract of agency may be amended by the parties, thereby reducing the extent of the agent's obligations to the principal or limiting the financial exposure. Where the principal is a consumer, the power to make such amendments is circumscribed by the Unfair Contract Terms Regulations ("UCTR").
2. Under contract
 - a. Where the consumer has a contract with an adviser who is not the consumer's agent, the contract may set out the extent of the adviser's duty of care. If not explicit, the courts will readily imply a duty of care and require the adviser to exercise reasonable skill and care.
 - b. As with the agency relationship, the extent of the duty of care may be limited by agreement, as may the financial consequences of any breach. As under 1b above, the adviser's ability to limit exposure is subject to UCTR.
3. Under tort
 - a. It is possible that a party which has no contract with a consumer may owe a tortious duty of care on the basis that detriment will be caused to the consumer as a direct result of the party's failure to observe reasonable skill and care in the manufacture of a financial product. This would be a parallel duty to the duty owed to the consumer by the manufacturer of tangible goods.

- b. In insurance it is normal for there to be a contract between the consumer and the provider/insurer of the product purchased, because the product is the insurance contract itself. The terms of an insurance contract are also subject to UCTR (save as to price). Therefore the position in tort is of less importance in insurance.

4. ICOBS

- a. ICOBS imposes a large number of obligations for the benefit of consumers, all of which are actionable by the consumer. Firms cannot contract out of the obligations imposed by the regulatory system.
- b. ICOBS 2.5.1R restricts the ability to contract out of non-ICOBS duties or liabilities i.e. those which arise outside the regulatory system, unless reasonable to do so.

5. Various Codes of Practice

From time to time the ABI and BIBA will issue codes of practice. These are non-binding, but tend to show the standards expected from firms in the service of consumers. Courts would have regard to such codes in considering whether a firm is in breach. Examples are the ABI's publication on Cluster Policies (October 2015) and BIBA's Code of Conduct (May 2015).

6. Professional Indemnity Insurance (PII)

If any material change is made to the liability landscape, the impact on the availability and cost of PII would need to be taken into account.