CONTENTS

Preface vii
Table of Principal Works Referred To ix
Table of Cases xxv
Table of Statutes cxiii
Table of Statutory Instruments cxix
Rules of the Supreme Court cxxi
Table of Abbreviations cxxiii

1. General
   1. The nature of professions 1-01
   2. Professional liability 1-04
      (i) General 1-04
      (ii) Contractual liability 1-08
   3. Tortious liability 1-13
      (i) The tort of negligence 1-13
      (ii) Theoretical basis for the duty of care 1-22
         (a) Lord Atkin’s approach 1-22
         (b) Hedley Byrne 1-24
         (c) The inclusive approach 1-26
         (d) The threefold test 1-30
         (e) The exclusive approach 1-36
         (f) Recent extensions of Hedley Byrne 1-44
         (g) The special position of public authorities 1-48
         (h) Analysis 1-52
         (i) Other Commonwealth approaches to duty of care 1-62
      (iii) Concurrent liability 1-75
      (iv) Liability to third parties 1-84
      (v) Immunity 1-92
   4. Standard of skill and care 1-95
   5. Shared responsibility 1-104
      (i) Apportionment of liability between wrongdoers 1-104
      (ii) Contributory negligence 1-109

[xiii]
## CONTENTS

1. **General—cont.**

6. Remedies for professional negligence 1-115  
   (i) Damages 1-115  
   (ii) Loss of remuneration 1-118  

7. Exclusion or restriction of liability 1-121  
   (i) The statutory framework 1-123  
   (ii) Exclusion of liability to third parties 1-127  

8. Limitation of actions 1-130  
   (i) The limitation period 1-130  
   (ii) Date when cause of action in contract accrues 1-134  
   (iii) Date when cause of action in tort accrues 1-136  
   (a) Claims against architects and engineers 1-137  
   (b) Claims against surveyors 1-146  
   (c) Claims against solicitors 1-148  
   (d) Claims against insurance brokers 1-154  
   (iv) Effect of the Latent Damage Act 1986 1-155  
   (v) Special rules re personal injury and death 1-161  
      (a) Primary limitation period 1-161  
      (b) Discretionary exclusion of time limit 1-165  
   (vi) Fraud or concealment 1-169  

9. Miscellaneous 1-172  
   (i) Group actions 1-172  
   (ii) Expert evidence 1-175  
   (iii) Interest on damages 1-178  

2. **Architects, Engineers and Quantity Surveyors** 2-01  

1. General 2-05  
   (i) Forms of building contract 2-06  
      (a) The “traditional” building contract 2-09  
      (b) The “design and build” or “turnkey” contract 2-11  
   (ii) Duties to client 2-12  
      (a) Contractual duties 2-12  
      (b) Duties independent of contract 2-20  
   (iii) Duties to third parties 2-35  
      (a) Definition of the type of loss 2-38  
      (b) Recovery by third parties in respect of personal injuries and damage to “other property” 2-48
2. Architects, Engineers and Quantity Surveyors—cont.

1. General—cont.

(iii) Duties to third parties—cont.

(c) The general exclusion rule adopted in England with regard to the recovery of economic loss 2-52

(d) The English exceptions to the general exclusionary rule 2-54

(e) The position in Canada 2-69

(f) The position in Australia 2-73

(g) The position in New Zealand 2-75

(h) Problems of scope of duty 2-77

(iv) The standard of skill and care 2-81

(a) The ordinary competent and skilled practitioner 2-81

(b) General practice and knowledge of the standard 2-84

(c) Not every error is negligence 2-89

(d) Special steps and warranty of reasonable fitness 2-90

(e) The specialist practitioner 2-96

(f) Reliance upon specialists and delegation to them 2-97

2. Liability for breach of duty 2-102

(i) Inadequate examination of site 2-103

(ii) Errors in design 2-106

(iii) Providing a misleading estimate 2-111

(iv) Errors in preparation of bills of quantities 2-116

(v) Failure to take reasonable care in selecting contractors 2-117

(vi) Inadequate advice on choice and terms of building contract 2-118

(vii) Insufficient knowledge of and non-compliance with legislation, planning and building control requirements and codes of practice 2-119

(viii) Failure to administer building contract properly 2-120

(ix) Inadequate supervision 2-122

(x) Incorrect certification 2-129

(xi) Inadequate specialist survey 2-132

(xii) Inadequate investigation of defects 2-133

3. Damages 2-134

(i) Type of damage 2-135
## 2. Architects, Engineers and Quantity Surveyors—cont.

3. Damages—cont.

   (i) Remoteness  
      (a) Causation  2–137  
      (b) Foreseeability  2–141  
   
   (ii) Measure of damages  2–144  

   (iv) Heads of damage  2–147  
      (a) Costs of rectification  2–148  
      (b) Diminution in value  2–154  
      (c) Wasted expenditure  2–155  
      (d) Excess expenditure  2–156  
      (e) Underpayment  2–157  
      (f) Liability to third parties  2–158  
      (g) Personal injuries  2–159  
      (h) Consequential losses  2–160  
      (i) Inconvenience  2–161  

   (v) Mitigation of damage  2–163  

   (vi) Shared responsibility  2–164  

## 3. Surveyors

1. General  3–01  
   
   (i) Bases of liability  3–07  
   
   (ii) Duties to client  3–18  
      (a) Contractual duties  3–18  
      (b) Duties independent of contract  3–31  
   
   (iii) Duties to third parties  3–32  
      (a) General principles  3–32  
      (b) Knowledge of reliance  3–37  
      (c) Duty of mortgagee’s valuer to purchaser  3–40  
   
   (iv) The standard of care and skill  3–49  
      (a) Reasonable standard  3–49  
      (b) General practice and knowledge as evidence of the standard  3–51  
      (c) Not every error is negligence  3–55  
      (d) Onus of proof  3–58  
   
   (v) Limitation of liability  3–59  

   (vi) Mutual valuer  3–70  

2. Liability for breach of duty  3–71  
   
   (i) Failing to carry out instructions  3–73  
   
   (ii) Insufficient knowledge or experience  3–75  

[xvi]

2. Liability for breach of duty—cont.

   (iii) Failing to inspect properly
         (a) Failing to inspect particular parts
         (b) Failing to uncover and open up
         (c) Failing to observe
         (d) Limited survey
         (e) Failing to recognise
   (iv) Failing to make sufficient inquiries
   (v) Failing to make a proper appraisal
   (vi) Inadequate report

3. Damages

   (i) Remoteness
       (a) Causation
       (b) Foreseeability
   (ii) Measure of damages
       (a) Negligent survey or valuation for a purchaser who completes a purchase
       (b) Negligent survey or valuation for a purchaser who withdraws from purchase before completion
       (c) Negligent survey or valuation for lender who would have lent nothing with a proper survey or valuation: Swingcastle Ltd v. Alastair Gibson; Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd
       (d) Contributory negligence by lender
       (e) Overvaluation for vendor
       (f) Undervaluation for vendor
       (g) Other work
       (h) Inconvenience and discomfort
       (i) Incidental expenses

4. Solicitors

1. General

   (i) Duties to the client
       (a) Contractual duties
       (b) Duties independent of contract
       (c) Fiduciary and trust duties
   (ii) Duties to third parties
       (a) General

[xvii]
CONTENTS

4. SOLICITORS—cont.

1. General—cont.
   (ii) Duties to third parties—cont.
      (b) Liability to beneficiaries without reliance 4–30
      (c) Duty of care to the other side 4–36
      (d) Solicitors’ liability on undertakings 4–44
   (iii) The standard of skill and care 4–53
      (a) The standard of reasonableness 4–53
      (b) General practice as evidence of reasonable
          skill and care 4–60
      (c) The specialist solicitor and the
          inexperienced solicitor 4–68
      (d) Mitigating factors 4–70
      (e) Aggravating factors 4–72
      (f) General observations 4–78
   (iv) Specific defences to a claim for breach of duty 4–80
      (a) Immunity 4–80
      (b) Abuse of process 4–83
      (c) Acting on counsel’s advice 4–85
      (d) Acting on client’s instructions 4–92
   (v) Shared responsibility 4–94
      (a) Contributory negligence 4–94
      (b) Apportionment of liability 4–97
   (vi) Solicitor’s liability for costs 4–102
   (vii) Exclusion or restriction of liability by contract 4–108
   (viii) Practice and procedure 4–109

2. Liability for breach of duty
   (i) Giving wrong advice 4–111
   (ii) Failing to give advice 4–117
   (iii) Misconduct of litigation 4–141
   (iv) Misconduct of non-contentious business 4–158
      (a) Conveyancing 4–159
      (b) Investment of money 4–170
      (c) Wills 4–175

3. Damages
   (i) Remoteness 4–178
      (a) Causation 4–183
      (b) Foreseeability 4–192
   (ii) Measure of damage 4–196
   (iii) Heads of damage 4–208
      (a) Loss of opportunity to acquire or renew an
          interest in property 4–209
      (b) Diminution in value of property 4–213
      (c) Loss of opportunity to bring proceedings 4–222
      (d) Loss of opportunity to defend proceedings 4–234
4. SOLICITORS—cont.

3. Damages—cont.
   (iii) Heads of damage—cont.
       (e) Loss of some other financial advantage 4–235
       (f) Liability to third parties 4–240
       (g) Criminal liability 4–243
       (h) Wasted expenditure 4–244
       (i) Incidental expenses 4–249
       (j) Physical injury, inconvenience and distress 4–251
   (iv) Mitigation of damage 4–257

5. BARRISTERS

1. General 5–01
   (i) The function of a barrister 5–01
   (ii) Contractual relationships 5–03
   (iii) Duties to third parties 5–05
   (iv) The standard of skill and care 5–06
   (v) Immunity 5–07
       (a) Justifications for immunity 5–08
       (b) Extent of immunity 5–13
   (vi) Abuse of process 5–19
   (vii) Liability for costs 5–20

2. Liability for Breach of Duty 5–25

3. Damages 5–37

6. MEDICAL PRACTITIONERS

1. General 6–01
   (i) Duties to patient 6–03
       (a) Contractual duties 6–03
       (b) Duties independent of contract 6–07
   (ii) Duties to third parties 6–13
   (iii) The standard of skill and care 6–32
   (iv) General and approved practice 6–48
       (a) Acting in accordance with general and approved practice 6–50
       (b) Departing from general and approved practice 6–59
   (v) Expert evidence 6–64
   (vi) Res ipsa loquitur 6–69
   (vii) Consent to treatment 6–76
       (a) Limits to consent 6–78
       (b) Voluntary consent 6–80

[xix]
6. **Medical Practitioners—cont.**

1. General—cont.
   
   (vii) Consent to treatment—cont.
   
   (c) Informed consent 6–82
   (d) Capacity to consent 6–85
   
   (viii) Allied professions 6–97
   (ix) Hospitals and health authorities 6–98
   (x) Apportionment of liability 6–106
   (xi) Lord Woolf’s proposals for reform 6–108

2. Liability for breach of duty 6–109
   
   (i) Failing to prevent illness 6–111
   (ii) Failing to attend or examine a patient 6–114
   (iii) Wrong diagnosis 6–118
   (iv) Error in the course of treatment 6–124
   (v) Failure of communication between hospitals or medical practitioners 6–134
   (vi) Failing to explain treatment or warn 6–138
   (vii) Mishandling of mentally disturbed patients 6–164

3. Damages 6–170
   
   (i) Remoteness 6–171
   (a) Causation 6–172
   (b) Foreseeability 6–196
   (ii) Measure of damages 6–199

7. **Insurance Brokers**

1. General 7–01
   
   (i) Duties to client 7–06
   (a) Contractual duties 7–06
   (b) Duties independent of contract 7–09
   (ii) Duties to third parties 7–11
   (a) Duties to insurers 7–12
   (b) Duties to other third parties 7–18
   (iii) The standard of skill and care 7–23

2. Liability for breach of duty 7–27
   
   (i) Failing to effect insurance 7–29
   (ii) Effecting insurance, but not on the terms specified by the client 7–33
   (iii) Effecting insurance which does not meet the client’s requirements 7–36
   (iv) Failing to exercise discretion reasonably 7–42
   (v) Failing to act with reasonable speed 7–44
   (vi) Failing to disclose material facts to the insurers 7–45
   (vii) Making a misrepresentation to the insurers 7–49
CONTENTS

7. INSURANCE BROKERS—cont.
   2. Liability for breach of duty—cont.
      (viii) Failing to keep the client properly informed 7-52
      (ix) Failing to give proper advice 7-57
   3. Damages
      (i) Remoteness 7-62
          (a) Causation 7-63
          (b) Foreseeability 7-80
      (ii) Measure of damages 7-81
      (iii) Contributory negligence 7-87

8. ACCOUNTANTS
   1. General 8-01
      (i) The statutory context 8-04
          (a) Companies legislation: the company audit 8-05
          (b) Regulatory statutes relating to the financial sector 8-15
          (c) Whistle blowing 8-16
      (ii) Duties to client 8-17
          (a) Contractual duties 8-17
          (b) Duties independent of contract 8-28
          (c) Fiduciary duties 8-29
      (iii) Duties to third parties 8-30
          (a) Pre-Caparo case law 8-34
          (b) Caparo Industries plc v. Dickman 8-47
          (c) Third party claimants other than equity investors 8-59
          (d) Liabilities arising from reports in listing particulars and company prospectuses 8-70
      (iv) The standard of skill and care 8-75
          (a) The standard of reasonableness 8-75
          (b) Not every error is negligence 8-80
          (c) General practice and knowledge as evidence of the standard 8-81
      (v) Exclusion/restriction of liability by contract 8-86
   2. Liability for breach of duty 8-87
      (i) Inadequate planning, control and recording of audit 8-90
      (ii) Inadequate ascertainment of enterprise’s accounting system and improper reliance on internal controls 8-93
8. **ACCOUNTANTS—cont.**

2. **Liability for breach of duty—cont.**
   - (iii) Failing to obtain relevant and reliable audit evidence
     - (a) Errors in inspection 8–97
     - (b) Errors in enquiry 8–111
   - (iv) Errors in reviewing financial statements 8–113
   - (v) Errors in reporting 8–115
   - (vi) Inaccurate advice 8–118

3. **Damages**
   - (i) Remoteness 8–120
     - (a) Causation 8–121
     - (b) Foreseeability 8–125
   - (ii) Measure of damages 8–127
   - (iii) Heads of damages 8–129
     - (a) Lost investment or advance 8–130
     - (b) Overpayment 8–131
     - (c) Moneys wrongly paid out 8–132
     - (d) Defalcations by director or employee of audited enterprise 8–133
     - (e) Costs of fresh audit and investigations 8–134
     - (f) Avoidance of double recovery 8–135
     - (g) Tax advice and returns 8–136
     - (h) Late notices and returns 8–137
   - (iv) Contributory negligence 8–138
   - (v) Relief from liability 8–149
   - (vi) Contribution 8–150

9. **MEMBERS AND MANAGING AGENTS AT LLOYD'S**

1. **General**
   - (i) Lloyd's of London 9–01
     - (a) The old regime 9–03
     - (b) The current regime 9–05
     - (c) The LMX spiral in the 1980s 9–06
   - (ii) Duties to client 9–07
     - (a) Contractual duties 9–07
     - (b) Duties independent of contract 9–09
     - (c) Fiduciary duties 9–12
   - (iii) Duties to third parties 9–13
   - (iv) The standard of care 9–17
9. **Members and Managing Agents at Lloyd's—cont.**

2. Liability for breach of duty
   (i) Members' agent – failure to advise adequately as to syndicate participation 9–20
   (ii) Managing agent – failure to plan properly 9–24
   (iii) Managing agent – unjustified departure from plan 9–31
   (iv) Managing agent – failure to obtain adequate reinsurance 9–32
       (a) Deciding what reinsurance cover to seek 9–33
       (b) Choosing the reinsurer 9–40
       (c) Maintaining commercial viability 9–44
       (d) Obtaining valid reinsurance 9–46
   (v) Managing agent – negligent underwriting of individual risks 9–47
   (vi) Managing agent – inadequate supervision of active underwriter 9–51
   (vii) Managing agent – negligence in relation to reinsurance to close 9–52

3. Damages
   (i) Remoteness 9–55
       (a) Causation 9–56
       (b) Foreseeability 9–65
   (ii) Measure of damages 9–66
       (a) Members' agents – consequences of failure to advise adequately as to syndicate participation 9–67
       (b) Losses caused by negligent underwriting 9–71

*Index* 961