I INTRODUCTION

i Legal framework

Article 383 of Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (the Civil Code) states:

(1) if that which is required of an obligor is . . . the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary. (2) In all cases, the obligor shall remain liable for any fraud or gross negligence on his part.

This Article is the cornerstone for claims for professional negligence in the United Arab Emirates (UAE). Gross negligence is not defined in the Civil Code; however, the wording above indicates that if the conduct is beyond what a reasonable person would exercise, there is argument that it may constitute gross negligence.

Under DIFC Law, tortious liability requires the following elements to be satisfied:

a the party at fault owed the party who suffered loss a duty of care;

b the party at fault breached the duty of care owed; and

c damage arose as a result of the breach of the duty (causation).

Further, the principle of remoteness is determinative in establishing whether the damage was foreseeable. If the damage is considered too remote, the third limb of negligence will not be satisfied.

The above elements (at common law) are not as well settled in the UAE arising from the Civil Code. Rather, the test is dependent upon satisfying whether there was an exercise of care in the performance of the obligations.

Pursuant to Article 124, the personal obligations may arise from either contract, unilateral acts, acts causing harm (torts) and acts conferring a benefit, and the law.

Article 196 of the Civil Code states that ‘any condition purporting to provide exemption from liability for a harmful act shall be void’. It is considered that this article concerns both

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claims for breach of contract and any tortious claims. Despite that, Article 390 indicates that contractual liability can be limited (i.e., in the form of liquidated damages); however, it is not permissible under the law to reduce liability arising from tortious claims.

Given that professional negligence can lead to significant loss and damage, there are a number of insurance providers in the UAE who provide coverage for professional indemnity. The most common forms of professional indemnity policies available in the UAE are industry-specific, such as the following:

- directors’ and officers’ insurance to cover the management of companies;
- errors-and-omissions insurance for brokers, consultants, lawyers, etc.;
- construction professionals’ (such as architects and engineers) insurance;
- accountants’, auditors’ and financial consultants’ insurance; and
- medical malpractice insurance for doctors, specialist or hospitals.

It is also worth noting that it is not uncommon for professional indemnity insurance products in the UAE to exclude coverage for wilful misconduct, fraud or gross negligence. It is in those instances that the companies (and, in certain circumstances, the individual at fault) may be liable for damages. Otherwise, those parties may be liable for any damages that exceed the limit of the policy.

Pursuant to Article 292 of the Civil Code, ‘In all cases, the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that this is a natural result of the harmful act’.

If the harm was caused by a number of different persons, then they shall be liable to the extent of their contribution, pursuant to Article 291 of the Civil Code.

There are a number of defences to professional negligence, including those related to the lapse of time (limitation periods as discussed below) or demonstrating that the party at fault exercised such care as a reasonable person (in the same circumstances) would have exercised. Further, the doctrine of contributory negligence has been raised in a number of UAE cases; however, its application to professional negligence has yet to be tested in the UAE.

ii Limitation and prescription

Given that professional negligence can arise from a breach of contract or through a breach of duty (i.e., in tort), there are two limitation periods that may apply.

The limitation period in respect of professional negligence arising from contract is 15 years according to Article 296 of the Civil Code; and the limitation period arising from a breach of duty is three years pursuant to Article 298 of the Civil Code. The latter would also apply to medical malpractice claims.

iii Dispute fora and resolution

In the UAE, claims for professional negligence are typically commenced in the court of first instance, which has jurisdiction to hear all civil lawsuits. Further, the Dubai International Financial Centre has the jurisdiction to hear professional negligence matters and has been host to a number of high-profile cases thus far.
iv Remedies and loss
Those who have suffered loss arising from someone else’s negligence can apply to the court for compensation by virtue of Article 389 of the Civil Code. That section states that ‘if the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof’.

Further, actions for specific performance are covered by Article 338 of the Civil Code, which states that ‘A right must be satisfied when the legal conditions rendering it due for performance exist, and if an obligor fails to perform an obligation, he shall be compelled to do so either by way of specific performance or by way of compensation in accordance with the provision of the law’.

In respect of medical negligence claims, compensation shall be payable for any harm caused to a person, pursuant to Article 299 of the Civil Code.

II SPECIFIC PROFESSIONS

i Lawyers
The governing law for lawyers in the UAE at a federal level is Federal Law No. 23 of 1991. Dubai Law No. 32 of 2008 is relevant for Dubai legal practices. The Government of Dubai Legal Affairs Department is the relevant authority, established under Article 3 of the above Law, responsible for regulating the legal industry in Dubai and the Abu Dhabi Judicial Department is the reciprocal authority in Abu Dhabi.

Lawyers who breach their duties as stipulated in Federal Law No. 23 of 1991 may be issued a caution, suspended from practising for a period not exceeding two years or be struck off the roster permanently.

Professional indemnity insurance is a prerequisite for legal practices in Abu Dhabi and Dubai.

ii Medical practitioners
Medical malpractice matters previously fell within the scope of the Civil Code; however, since the introduction of Federal Law No. 10 of 2008 and its successor, Federal Law No. 4 of 2016, medical negligence is now covered by Article 3 of the latter instrument, whereby: ‘Any person who practises the profession in the state must perform the duties of his job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’. and Article 14, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the same degree and specialisation is supposed to be aware of; a failure to follow the recognised professional and medical standards; a failure to act with the necessary due diligence and; negligence and a failure to act carefully and with precaution.

The above Articles indicate that a breach of duty (in a medical context) is determined by the failure to follow prescribed practices or standards and it is not dependent upon the outcome of the medical intervention.

The Medical Liability Supreme Committee (the Committee), comprising 10 members, was established pursuant to Article 18 of Federal Law No. 4 of 2016. The Committee is responsible for determining whether a medical error has occurred, the damage caused and
whether a causal relationship exists between the fault and the damage. The Committee responds to matters presented through the Ministry of Health and Prevention (or local health authorities), the Public Prosecution or the UAE courts.

Pursuant to Chapter IV of Federal Law No. 4 of 2016: ‘the [medical] profession may not be practised in the UAE without an insurance against civil liability for medical errors [by] an insurer licensed in the UAE’.

iii Banking and finance professionals

The UAE Central Bank is the overarching regulatory authority in the UAE, except for the Dubai International Financial Centre, which is governed by the Dubai Financial Services Authority.

iv Computer and information technology professionals
The Telecommunications Regulatory Authority, established pursuant to UAE Federal Law No. 3 of 2003, is the authority responsible for regulating the information technology sector in the UAE.

In carrying out its functions, the Telecommunications Regulatory Authority has the following objective, pursuant to Article 13 of Federal Law No. 3, *inter alia*: ‘ensure that the telecommunications sector provides high quality and efficient services to subscribers’.

v Real property surveyors
Specifically in relation to Dubai, Law No. 6 of 2017 on the Regulation of Land Survey Work was introduced to provide guidance to the surveying industry. Specifically, Article 4 of Law No. 6 states ‘This law aims to achieve the following: 1. Regulating and implementing Land surveys, Water Surveys, and Seismic Surveys in the Emirate (of Dubai), in accordance with the best international practices applied in this regard’.

Pursuant to Article 5 of Law No. 6, the Municipality of Dubai is the ‘competent authority to regulate the survey works in the Emirate (of Dubai) and the official authorised source for providing the data and information resulting therefrom’.

vi Construction professionals
There are a number of insurance policies that need to be considered in the construction industry from a negligence perspective. The obligation to obtain professional indemnity insurance does not arise from statute in the UAE but rather from the provisions of the construction contracts between the parties. There are two major types of negligence-related actions that are considered herein, namely professional indemnity and decennial liability.

The necessity for professional indemnity insurance arises out of the professional aspects of the construction industry, such as drafting and preparing designs for projects. These policies are usually on a ‘claims-made’ basis, whereby the policy in force at the time of the event leading to the claim is the applicable policy, as opposed to the policy in force at the time when the negligent event occurred.

Decennial liability arises out of the operation of Articles 880 to 883 of the Civil Code. In essence, architects and contractors carrying out works may opt to obtain and renew project-specific insurance for a period of 10 years (unless the contract specifies a longer
period) commencing from the time of delivery of the work as they are ‘jointly liable for a period of 10 years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building’. The problem arises in the UAE that this type of coverage is difficult to acquire and is very expensive, particularly when held over a period of more than 10 years.

vii Accountants and auditors

The Accountants and Auditors Association is the national accountancy body in the UAE. That body was established in accordance with Ministerial Decree No. 227 of 1997.

Pursuant to Article 5 of the above Decree, one of the major objectives of the above regulatory body is: ‘To propose the suitable organisation for the field control to ensure the implementation of the accounting and auditing standards by the chartered accountants and auditors so that they observe the rules and regulations of the profession and the prevailing economic laws in the country’.

Pursuant to Article 9 of the above Decree, the duties of the members of the Accountants and Auditors Association are as follows:

1. The member shall endeavour to attain the goals of the association and shall abstain from any acts that harm others or the association or damage its reputation.
2. To follow the statute of the association, its bylaws and the resolutions of the Board of Directors. He shall inform the Board of Directors about any violation committed by others...
4. He shall be a good example in his conduct and behaviour.

viii Insurance professionals

The Insurance Authority is the regulatory body responsible for the regulation of insurance professionals in the UAE. That body was established pursuant to Federal Law No. 6 of 2007.

Pursuant to Article 7 of the above Law, the Insurance Authority ‘aims at organising and overseeing the insurance sector in a way that would ensure suitable environment to develop it and enhance the role of the insurance industry to secure lives, properties and liabilities against risks to protect the national economy’. Further, the Insurance Authority shall carry out the following duty: ‘Enhancing performance and efficiency of the insurance companies and binding them to observe the profession’s code and rule of conduct to enhance their capabilities to render the beneficiaries of the insurance the best services and attain constructive competition’.

III YEAR IN REVIEW

The introduction of laws specific to medical negligence have been the most significant development from a professional negligence perspective over the past 18 months in the UAE. Pursuant to Article 3 of Federal Law No. 4 of 2016 doctors may now be liable for medical negligence if they do not ‘perform the duties of [their] job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’.

The standard of care required by doctors is now defined by Article 14 of the above Federal Law, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the
same degree and specialisation is supposed to be aware of; failure to follow the recognised professional and medical standards; failure to act with the necessary due diligence; and negligence and failure to act carefully and with precaution.

IV OUTLOOK AND FUTURE DEVELOPMENTS

It will be interesting to see if the above laws relating to medical negligence will open the floodgates for other professions. One would assume that lawyers would be next in line to be bound by specific negligence provisions; however, for the moment it is only doctors in the UAE that are under the spotlight. Actions brought against professionals (other than those within the medical profession) remain governed by the Civil Code for the time being.
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