

What standard will courts use to measure the conduct of professional independent and other trustees



The standard of care which the law demands is ordinarily that which a reasonable person in the position of the defendant would exercise in the same situation.

Objective standard

If a person has knowledge and skill superior to that of the ordinary individual the law requires more than the minimum standard of care

Subjective standard

The legal standard of care in effect becomes that of a reasonable person endowed with those particular superior qualities.

Conduct which deviates in even the slightest degree from the standard of a reasonably prudent person is adjudged negligent.

*Durr v ABSA Bank  
Ltd & another*

## Two questions arise -

1. In general, what is the level of skill and knowledge required?
2. Is the standard required that of
  - the ordinary or average broker or
  - the regional manager of the broking division of a bank professing investment skills and offering expert investment advice?

## Innes CJ in Van Wyk v Lewis 1924 AD

“It was pointed out by this Court, in Mitchell v Dixon (1914 AD at p 525) that ‘a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care’

And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.

However, the second question is less easy ...

What is actually needed is first to determine what skills the particular kind of broker needs to exhibit,

which must depend in large part on what skills he is held out to possess.

“The reasonable person has no special skills and lack of skill or knowledge is not per se negligence.

It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.”

“Mrs Durr was entitled to see him as a man skilled to advise her on such matters and as one backed by a major bank: not as one devoid of skill in assessing creditworthiness and unready to seek help”



# the position of the retirement fund trustee

“Pension fund trustees are being asked to take crucial investment decisions, yet many lack resources and expertise. They are often unsupported by in-house staff, and are rarely paid”

expectations of trustees not realistic ...

“The standard of prudence traditionally required of non- professional trustee has been rather low.

The general rule is that a non-professional trustee need act only with **the prudence he or she would take on the management of his or her own private affairs.**”

Recommendation: (Australia and Ontario)

“to exercise in all matters affecting the fund, the same degree of care and diligence as an ordinary prudent person would exercise in dealing with **property of another** for whom the person felt morally bound to provide and to use such **additional knowledge and skill as the trustees possesses or ought to possess by reason of the trustee’s profession, business or calling**”

## Section 7C

- To direct, control and oversee fund operations in accordance with applicable laws and rules of the fund
- take all reasonable steps to ensure that members' interests in terms of the rules and the Act are protected at all times
- to act with care, diligence and good faith
- and to avoid conflicts of interest.

- Trustee code of conduct
- Acceptance of trust
- Declaration of interest
- Protocol on gifts
- Trustee training protocol
- System of appraisal

## Financial Institutions (Protection of Funds) Act

- Section 2(a) : requires a trustee to -

exercise the usual care and diligence **required of a trustee** in the performance or discharge of his/her powers and duties etc

## A failure to comply

- a criminal offence
- a fine or imprisonment of up to 15 years can be imposed on conviction
- repay any profit that was made
- compensation for any damage suffered.

# Size of funds in SA

Number of Members and Pensioners	Number of Funds	Percentage of Total	
		By Funds %	By Members %
1-20	7 354	54,8	0,4
21-50	2 019	15,1	0,8
51-100	1 206	9,0	1,1
101-500	1 829	13,6	5,0
501-1000	429	3,2	3,7
1001-5000	434	3,2	11,7
5001-10000	58	0,4	5,1
10001+	91	0,7	72,2
	13 420	100,0	100,0

## What are the requirements?

- No qualifications or experience required (not disqualified ...)
- At least 50% can be elected by the members.  
*(to ensure member representation on the forum where decisions are made – democratisation of retirement funds)*
- The balance nominated by the employer

A trustee can be described as -

- A part-timer
- doing voluntary unpaid work
- whose recommended training – if and when completed – will be at grade 11 level
- taking investment decisions iro millions / billions of rands of retirement fund assets...

**Are we realistic about our expectations of trustees ...**

These 27 000 brokers, and I say it in a non-pejorative sense, must be a motley lot.

- W expressed the view that G's expectations of them were too high.
- W's "typical broker" is a man of modest accomplishment.

The opinions of the experts “are of assistance”

the Court will form its own opinion

It is negligent to engage in any potentially dangerous activity unless one has the skill and knowledge **usually associated** with the proper discharge of the duties connected with such an activity

## The test for recklessness

- objective - the standard of conduct of the notional reasonable person
- subjective - insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge

So if director A, being, say, a farmer, did not know certain relevant facts which, by justified inference, would have been within the knowledge of his co-director B by reason of the latter's professional qualifications or experience, say, as a chartered accountant,

Howie JA

... then A's ignorance will be blameworthy if he ought reasonably to have sought B's advice, that is to say, not advice qua accountant but advice qua director having additional relevant knowledge. And B's position will be assessed, not just as a director-businessman, but as one having that extra knowledge.

## **Board decision**

Naturally, opinions, even among notional reasonable people, may differ,

but in the case of a unanimous board decision it is that decision which must be subjected to the necessary objective test.

*joint and several  
liability*

The cases cited in the previous edition of this work and in Corbett for saying that an innocent trustee is jointly and severally liable with other trustees where they are guilty of negligence or breach of trust do not justify that view.

What if

- you voted against the proposal?
- you were not present at the meeting?
- the task was delegated to a committee and you did not serve on that committee?



# professional independent trustee

A professional independent trustee

- need to be satisfied with the correctness of a decision or should clearly vote against it
- should raise concerns and explain any discomfort in the decision making process

The other trustees will ignore these concerns at their peril ...

Given the rule of law concerning the undertaking of activity requiring skill, Stuart was in a constant dilemma...

Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended Supreme.

SCHUTZ JA

What he was not entitled to do was to venture into a field in which he professed skills which he did not have and to give them assurances about the soundness of the (advice) which he was not properly qualified to give.



Thank You

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