

# PROFESSIONAL SELF-DEFENCE

by

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## General and introductory

1. Many professionals are exposed to negligence claims, in contract and in tort. I am not going to deal with the position of, e.g., doctors and architects. Instead I am going to concentrate on the position as it affects the professionals with whom those in this room are perhaps most likely to come into contact in the business setting – solicitors, barristers and accountants. In what follows, ‘professionals’ means professionals within one of those three groups.
2. Professionals are exposed to claims from their clients and, perhaps increasingly, from persons who are not their clients and whom they have never met and whose existence they may never have dreamed of until it is explained to them by the ever-foresightful judicial mind that they should have been thinking about them all along.
3. All the professional bodies we are considering essentially approve of the fact that their members are subject to personal liability for their mistakes where those mistakes cause loss. This is inherent in the fact that all three bodies make the possession of PI insurance a pre-requisite to practising. All three, however, recognise (tacitly in the case of the Bar Council) that it may be legitimate in certain circumstances to permit their members to limit their liability by contract or notice. I shall be looking at that in a little more detail in a moment, but before doing so, it may be worth considering more general forms of self defence.
4. The way in which professionals are trained and carry out their work means that incorporation with limited liability as a means of self protection has always been problematic (quite apart from any objections from professional bodies or, for that matter, the legislature), because so much of the work done involves direct input coupled with a personal interface with the client. The result is that even if the professional were to be no more than an employee of a limited company which provided his services to the public, he might well, despite the decisions in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 and *Standard Chartered Bank v Pakistan National Shipping Corpn* [2001] 1 Lloyd’s Rep 218, still find himself liable to third parties: *Phelps Hillingdon London Borough Council* [2001] 2 AC 619 (educational psychologist employed by local authority, but principle clearly applies as well to corporations).

4. A sad example is to be found in *Merrett v Babb* [2001] QB 1174. A valuer who was a salaried employee of a single member firm gave a valuation to a building society who passed it on the borrower. The sole principal went bankrupt and his trustee cancelled the firm's PI insurance without providing for run off. Defects then appeared in the property and the borrower successfully sued the employee. The CA upheld the decision (Aldous LJ dissenting). The majority distinguished *Williams* because it concerned a limited company, but Aldous LJ (rightly, I think) said that the principles should not turn on a distinction between companies and partnerships.
5. These cases show that even though, as presumably is the intention, the effect of the Limited Liability Partnerships Act 2000 is that members of LLP's are not generally liable for the LLP's debts and other obligations (the 2000 act no-where says so in terms and sub-section 6(4) certainly contemplates individual liability attaching to members), nevertheless in the case of an LLP consisting of professionals the protection may be paper thin where the issue is negligence (whether in tort or contract) rather than simple contract debts and other commercial obligations. In my opinion, the safer view is to treat the 2000 Act as providing no sure protection against direct personal liability in cases of professional negligence. Annex 3K (2004 update) to the Guide to the Professional Conduct of Solicitors tends to agree, although in rather less baleful terms. This is not to overlook one definite benefit of LLP's – that if one member does incur a personal liability, the LLP is equally liable (sub-section 6(4)), but no personal liability attaches directly to the other members (as is the case with an 1890 Act partnership, where a claimant can have recourse to the assets of all the partners in respect of a mistake made by one only of them).
6. Last in this section, it must not be forgotten that many negligence cases concern the question whether the mistake complained of actually fell within the duties of, or the responsibilities assumed, by the negligent professional. Some considerable protection can be obtained by clearly limiting, not the recoveries obtainable, but the scope of the retainer or job, to strictly defined tasks. Certainly both solicitors and accountants are familiar with laying down the ground rules in this way before work commences. Barristers, by habit or whatever, rarely seek to do this in any structured way. Limiting the scope for liability in this way does not engage the Unfair Contract Terms Act 1977 or the 1999 Unfair Terms in Consumer Contracts Regulations.
7. With that introduction I am going to turn to the question of self protection by means of contractual terms and notices seeking to exclude or restrict liability for negligence or negligent breach of contract.

#### The Bar

8. The Bar has no stated policy about the use by barristers of express stipulations excluding or limiting liability. Presumably attempts to

exclude all liability would be frowned upon and might well be 'prosecuted' as calculated to bring the profession into disrepute. Although notoriously there is no contract between a barrister and his or her instructing solicitor or lay client, the Unfair Contract Terms Act 1977 covers not only contractual terms but also non-contractual notices excluding or restricting liability in tort (section 2). This means that any notice excluding or restricting negligence liability must satisfy the 'fair and reasonable' test (section 11(3)). Section 3 of the 1977 Act will not (subject to something I will say in a moment) apply, since it deals with contractual duties only. Section 11(4), requiring any notice seeking to restrict liability to a specific sum of money to conform to the reasonableness test, will apply to an attempt by a barrister to cap his liability and the Act directs that the reasonableness test should pay particular account of the extent of the personal resources the party relying on the limitation has to meet the potential liability and how far he could have covered himself by insurance.

9. The Unfair Terms in Consumer Contracts Regulations 1999 do not obviously apply to any attempt by a barrister to exclude or restrict liability, given the absence of a contractual relationship between barrister and professional and lay clients. It may be, however, that the Court would hold that the terms excluding or restricting liability amount to a collateral contract, the consideration being the mutual agreement to form a professional relationship. If that view is correct, then any term in such a disclaimer needs, additionally, to be both fair and plainly intelligible. However, the 1999 Regulations will not apply where the lay client is a limited company or other non-natural entity (Reg 3(1)).

#### Solicitors

10. The Law Society's guidance to members is set out at Principle 12.11 of the current Guide to Professional Conduct of Solicitors.
11. A particular restriction on solicitors' ability to exclude liability is to be found in section 60(5) of the Solicitors Act 1974 (before the enactment of the 1977 Act). That provides that any provision in a contentious business agreement that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as a solicitor, shall be void. The sub-section appears to strike down only terms *excluding* liability and would appear to leave untouched terms which attempt to restrict it by e.g. putting a money cap on recoveries. There is no doubt that a term whether in a contentious or non contentious business agreement purporting to exclude all negligence liability would fail under the 1977 Act and (where the client is an individual) under the 1999 Regulations. Additionally, the Law Society describes it as 'not acceptable' for solicitors to attempt to exclude by contract all liability to their clients.
12. Solicitors, unlike barristers, will be subject to the provisions of section 3 of the 1977 Act, which subjects attempts in contracts to exclude or restrict

business liability for breach of contract to the reasonableness test. Although section 3 applies only to clients who give a retainer as 'consumers' it is unlikely that many clients, incorporated or not and however large are their enterprises, will fail the 'consumer' test when instructing a solicitor: *R&B Customs Brokers Co Ltd v United Dominions Trust* [1988] 1 WLR 321.

13. Again, section 11(4) of the 1977 Act will govern attempts to limit the quantum of damages recoverable whether in contract or in tort by an injured client. The Law Society's Guide adds a further restriction, by providing in Principle 12.11 that there is no *conduct* objection to solicitors seeking to limit the quantum of any liability, provided that the limitation is not below the current minimum cover level - £1 million.
14. The 1999 Regulations will impose the additional requirements of fairness and clarity on all attempts by solicitors to exclude or limit liability in cases where their clients are individuals.
15. The Guide also says that the Law Society Council takes the view that it may be reasonable in some circumstances for a solicitor to seek to limit or even exclude altogether a potential *Hedley Byrne* liability to persons other than their clients. As indicated earlier, any such attempt would be caught by sections 2 and 11(4) of the 1977 Act. Perhaps more problematical are the mechanics of achieving the exclusion or limitation in the context of solicitors' work. It is hard to see how the solicitors in *White v Jones* could effectively have excluded their liability to the disappointed beneficiaries by warning them in advance that they declined to accept any liability to them if they failed to obtain execution of the will. On a more practical level, there may be scope for a successful attempt where the solicitor acts as solicitor to an offer in a takeover situation or otherwise is engaged in work which will inevitably impact on classes of persons other than his or her own client and where the opportunity exists in circulars or otherwise to include disclaimers or restrictions. Whether offer documents laden with exclusions from the offeror's legal advisers would find favour with clients is another matter.

#### Accountants

16. The Institute of Chartered Accountants in England and Wales provides guidance to its members in the management of professional liability risks. It recognises that attempts to exclude or limit negligence liability by means of contractual terms are subject to the legislation briefly noted earlier. It suggests that terms attempting to restrict, rather than exclude liability might reasonably reflect the annual limit of indemnity required by the Institute where a firm's gross fee income is less than £400,000 per annum. In such cases, the cover must be two and a half times gross fee income, subject to a minimum in the case of a sole practitioner of £50,000 and in any other case £100,000 and the Institute suggests that a start point for discussions with a client could use these calculations to provide a financial ceiling on recoveries.

17. Like the Law Society, the Institute also suggests that accountants attempt to protect themselves from *Hedley Byrne* type liability to third parties. Accountants may well have more opportunity than solicitors to fix third parties with effective disclaimers. Any such disclaimers will still be caught by section 2 of the 1977 Act.
18. Accountants are subject to a particular restriction in relation to statutory audits. Section 310(1) of the Companies Act 1985 renders void any provision exempting a company's auditors from any liability in negligence in relation to the company. Although the wording talks of 'exemption' rather than restriction, I have little doubt that attempts to limit auditors' liability would fall within the section. Section 310(1) does not impact on attempts by accountants to limit liability to third parties in respect of their audit work. Again, however, one wonders how many companies would like to see their accounts carrying a disclaimer from the auditors that third parties would be well advised not to rely upon them.

#### Disclaimer

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