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FOREWORD

In selecting the topic of "Professional Liability" for its first Seminar in 1973, the Legal Research Foundation considered that the interest, and indeed the concern, of members of all professions in this subject merited a detailed study. The widespread support and participation in the Seminar justified this view. It is obvious that the risks faced by Professional men in their daily practice, and the escalating costs of insurance, call for much fuller investigation of alternative means of protection. There are few areas of business or commercial activity left outside the professions where an individual's liability cannot be protected or limited in a satisfactory way.

The aim of the Seminar was to re-state the existing legal and insurance position and background; and to suggest lines of development whereby the burden of responsibility could be mitigated. It is hoped that further study of this problem may benefit from the research and background evident in the following papers presented at the Seminar, and that the alternatives put forward will be found useful.

The Foundation is grateful to the authors of the papers presented for their obviously thorough preparation and the interesting manner in which they were presented; our thanks are also due to the commentators and to all who contributed at the discussion to make the Seminar such a success. We also acknowledge or gratitude to the University for making their facilities available to the Foundation, and last (but not least) to our hard-working secretary, responsible for the bulk of the administration and the recording and preparation of the material in this booklet.

M.E. Casey
Seminar Convener.
FIRST SESSION
OPENING REMARKS

The Legal Research Foundation meets again to consider a problem which is causing grave concern to professional men throughout the country and, indeed, throughout the world. The Seminar fulfils its object of gathering the expertise which exists in this city and in this country, to consider the problems which continually arise in this changing world.

The Seminar today is entitled "A Seminar on Professional Liability", and the large numbers gathered indicate the importance of the topic, and the concern with which it is viewed by doctors, lawyers, engineers, accountants, architects, and members of every other profession.

With the pressures that are on us these days it is a bold man who could say that he would never make a mistake, let alone that he would have a system which would always pick up a mistake made by his associate or his clerk. And yet the consequences of a momentary lapse, with the increasing sophistication of modern life, are such that a lifetime of hard work, a respected position in the community and an ability to give service to the public can be wiped out overnight.

It is a problem that affects not only the individual but the community, because the loss to the community of the services of a skilled professional man is a loss which the community cannot afford, and the loss of skills which the community as a whole has paid for.

The other side of the coin is, of course, equally obvious. A person injured by professional negligence is entitled to look to the person who has injured him, and faced with a choice of where a loss must fall justice demands some compensation to the injured person.

Different methods of dealing with this difficult problem are being debated. It may yet be too soon for the type of thinking in the Accident Compensation Bill, that negligence or lack of care is an inevitable consequence of the pressures of modern life and that actions for negligence in property matters as well as in personal injury claims should be abolished, leaving the community as a whole to bear the burden. Some method of spreading the risk is obviously required, and you have been gathered by the Legal Research Foundation, that from your collective wisdom some thoughts may emerge which will assist.

May I wish us all inspiration and the ability to listen, that good fortune will attend our deliberations.

You have had distributed to you a programme, setting out the activities of the day, and I do not propose to go through it. The first speaker is my old friend and respected colleague, Jack Vautier, who with his usual clarity, as demonstrated by the summary he prepared, set out in your programme, will speak on the Law of Negligence relating to the professions.

Jack Vautier.

P.G. Hillyer, Q.C.
THE LAW OF NEGLIGENCE RELATING TO
THE PROFESSIONS

by M. H. Vautier,

1. The fundamental basis of the liability of professional men to those people
for whom they perform services is that of breach of contract. The law in every
cause of action on the part of the professional man has been held to exist
he has not been careless at all — he has on the particular occasion used all the
care he could muster, but the standard to be applied is an objective one and he is
held liable because the degree of skill or knowledge he was able to exhibit has
been held to fall short of the standard which it is considered he should have
attained. This will be illustrated in some of the cases to which I will refer later.

2. This general basis of liability to which I have referred is extended or
altered, however, in a number of particular instances where professional men are
concerned.

First it is necessary to refer to the special cases where what is called a
status relationship comes into being. These status relationships do not ordinarily
affect professional liability. The English common law from very early times
recognised such relationships as coming into being in the case of persons
exercising certain common callings such as carriers and innkeepers. So also did it
as regards bailors of chattels who can thus incur liability even though the
bailment is gratuitous. So it did in the case of master and servant. Unless the
professional man happens also to bring himself within one of these special status
relationships liability will not be held to rest upon him in any such way.

The existence of one of these status relationships results in the defendant
being able to be sued either in contract or tort, i.e. without the necessity of
establishing any actual contract at all, but simply on the basis of breach of a
duty of care owed to the plaintiff. It is of interest to note that following the
decision of the House of Lords in *Hedley Byrne & Co Limited v. Heller &
Partners* 1964 A.C. 465 to which I will be referring again later, the argument was
put forward that because of this decision it should now be recognised that this
status situation applied to professional men generally. This was done first in
relation to solicitors in *Clark v Kirby Smith* (1964) 2 All E.R. 835 and then in
respect of architects in *Bagot v Stevens Scanlan & Co.* 1964 3 All E.R. 577, but
in both these cases the Court held that notwithstanding the House of Lords
decision the liability of solicitors and architects to their clients rests in contract
only and the client does not have the option of suing either in contract or in
tort.

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Secondly, however, there is one large class of professional people whose liability does rest not only on the basis of contract, but also in tort. These persons may thus be held liable even though there is no contract of any kind entered into either expressed or implied with the person for whom the services are rendered and no fee paid or agreed to be paid. These are all those persons who in the course of their work may cause physical injury to the persons whom they serve. Such are, of course, medical men, dentists, nurses, physiotherapists, radiologists, pharmacists, chiropractors and all such callings. The liability of the surgeon, along which lines I should mention with the apothecary, the barber and the blacksmith, in this way goes back to such early times that it may well have originally rested upon the status basis, a view supported by Holdsworth in his History of English Law, but the basis of the liability today clearly can be and is founded upon the fact that there is a general duty of care resting upon everyone not to cause physical injury to the person or the property of another, the breach of such duty being a tort whereas no such general duty is recognised to avoid causing mere financial loss to another person. It should be noted that as was pointed out by a contributor to Medicine Science and the Law 1964 at p. 285 the law does not treat the results of the negligence of a professional man such as an architect or an engineer as resulting in physical damage to property even though the consequence to the plaintiff is a physical defective building.

Then to be considered are those cases where liability arises because of the existence of a fiduciary relationship. This situation arises whenever a person finds himself in a position of trust or has some confidence reposed in him. It is the duty of a person so placed, apart altogether from contract, to use care and skill in the conduct of the affairs entrusted to him. No professional qualifications or calling need be involved here, of course, at all, but it is very common indeed for professional persons to become involved in such relationships. All cases where a person acts as agent for a principal, or trustee for a beneficiary, of course come under this heading, but it is important to note that the relationship arises whenever a solicitor or an accountant becomes personally involved in business transactions in which a client is also involved. Thus in Noxon v Lord Ashburton 1914 A.C. 932 a solicitor who arranged for a client to give a security over certain property without disclosing that this improved the position of a security the solicitor himself held, was held liable to the client.

Lastly there is the wide extension of liability now to be contended with because of the decision in Hedley Byrne & Co. following the dissenting judgment of Lord Denning in Candler v Crane Christmas & Co. 1951 1 All E.R. 426. This may indeed be regarded simply as an enormous extension of the fiduciary relationship concept. The principle laid down by the House of Lords is thus stated:

“If in the ordinary course of business or professional affairs a person seeks information or advice from another, who is not under the contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on; and the person asked chooses to give the information or advice without clearly so qualifying his answer so as to show that he does not accept responsibility then the person replying accepts a legal duty to exercise such care as the
circumstances require in reply; and for failure to exercise that care an action for negligence will lie if damage results."

This decision in one resounding blow obliterated what had been regarded for nearly a century as being the law, i.e. that in the absence of contract an innocent although negligent misrepresentation could never give rise to an action.

As with every such sweeping new principle laid down in a decision of such authority as this attempts have since been made to show that decisions of the Courts in other allied but dissimilar circumstances have been rendered obsolete. I have already referred to two such attempts. In New Zealand we saw an example of the far-reaching effect of this decision in a case where, when a land agent was showing two prospective purchasers a house property one pointed to a mushroom-like object on the back lawn and said is that a septic tank. Relying on the information given by the owner the land agent said "No, it used to be but the sewerage is now connected". It wasn’t and he was held liable, (Barrett & Anor v J.R. West 1970 N.Z.L.R. 789).

There is no doubt that this decision creates a rather frightening spectre lurking in the wings for every professional man. It is not much comfort to him for Professor Street to point out the commuter who sees his fellow-passenger reading the Financial Times and asks him what shares to buy has no remedy if he receives careless advice and acts on it to his loss. So far as we in New Zealand are concerned the wide scope of the decision has been cut back materially by the decision of the Privy Council in *Mutual Life & Citizens Assurance Co. Limited v Evatt* 1971 A.C. 794 where it was held that the duty of care in giving gratuitous advice arises only when the advisor carries on the business or profession of giving advice of the kind sought. There must be in other words a holding out of possession of the necessary skill and competence to give the particular advice. This would very likely have let out the land agent to whom I have referred. It is a little disturbing to reflect, however, that if Mr Whitlam’s Government had been elected earlier in Australia we might have had a decision of the High Court of Australia the other way to contend with.

3. The distinction to which I adverted earlier between contractual and tortious liability generally speaking makes little difference to the practical outcome of the case which goes to trial. It is, however, of considerable importance and interest to insurers because of the effect on time limits. The architects in *Bagot’s* case, for example, escaped liability entirely because the contract was concluded in 1957 and the drainage system did not collapse until 1961 and the writ was not issued until 1963 and the six-year period had then elapsed. In tort the cause of action would have dated from the collapse. I sincerely hope the solicitors were not at fault for not realising that the action lay only in contract and thus not getting the writ out earlier.

There is some importance in the distinction too in that breach of contract entitles a party generally speaking to nominal damages even though no actual damage is proved whereas damage is an essential part of the cause of action in tort. Thus in one case the plaintiff may be entitled to his costs and in the other not. Interesting examples of this are provided in cases cited in Medicine Science and the Law, the Journal of the British Academy of Forensic Sciences, to which I have already referred where plaintiffs have sued and recovered damages in cases
where surgeons have gone beyond the contract and removed in the course of an
operation some part of the body even though as in the case of tonsils there is no
known useful function of this part or even where it was diseased and better in
the patient’s interests removed while the other operation was being done.

4. As to the standard of knowledge, care and skill, this, as I have said, is a
standard set by the Courts and it is important to realise that it must be a
reasonable standard only. The client or patient is not entitled to the highest
standard. As in all walks of life some men are better at their jobs than others.
The standard was laid down nearly a hundred and fifty years ago in Lamphier v
Phipos (1838) as it is applied today:-

“Every person who enters into a learned profession undertakes to bring to
the exercise of it a reasonable degree of care and skill. He does not undertake if
he is an attorney that at all events you shall gain your case nor does a surgeon
undertake that he will perform a cure, nor does he undertake to use the highest
possible degree of skill. There may be persons who have higher education and
greater skill than he has, but he undertakes to bring a fair, reasonable and
competent degree of skill.”

This point becomes of particular importance in the cases where treatment
has been provided as it must be if our hospital system is to function by relatively
inexperienced house surgeons.

In a number of American decisions it has been stated that the standard of
skill and care which is demanded of a medical man practising in a particular
locality is the general standard existing among other practitioners in that
locality. Thus, for example, a doctor or an attorney practising in a remote
country district, it has been said, cannot be expected to conform to the standard
set by his big city brethren. No such distinction can be said to be recognised in
English or New Zealand Courts, but the average degree of skill and competence
is, it must be noted, all that can be required.

How is this to be established? The Courts have in this regard always
accepted evidence on the question in the form of opinions of fellow
professionals in the same field. An opinion given by Tindle C.J. in an old case,
Chapman v Walton 1833 10 Bing 57 is still cited today on this point. In a case
involving an insurance broker he said:-

“The most satisfactory way of determining the question is to show by
evidence whether or not a majority of skilful and experienced brokers
would have come to the same conclusion as the defendant.”

The legal practitioner may possibly be in a somewhat disadvantageous
position in this regard. Judges themselves always having had extensive experience
of practice do not think such evidence necessary in cases involving legal
practitioners and because they themselves possessed a high standard of
competence when in practice may unconsciously tend to set the standard a little
too high. Thus, in a recent case, Murray & Anor v Bannerman Brydone & Folster
& Co. 1970 N.Z.L.R. 1034, a man called Graham being in desperate straits for
money arranged to borrow $10,000 from a man named Murray, on the security
of Graham’s farm. The cheque was handed over with nothing else signed, but an
arrangement made to meet the following day, a Friday, in the office of a
solicitor in Gore to record the arrangements which had been agreed. It is not
clear whether the solicitor was given any details at all until the meeting at 4 p.m. on the Friday. The solicitor then and there drew up a memorandum recording an agreement made to give a 2nd mortgage and also recording that Graham give Murray an option to buy the farm within 2 years at a stated price.

In the Supreme Court the solicitor was held to have been negligent for not advising Murray that the option was invalid because it constituted a clog on the equity of redemption.

About 90% of the solicitors engaged in conveyancing in New Zealand if they were honest with themselves probably felt their throats getting a little dry when they read that decision and privately said to themselves, "I'm damned if I would have thought of that either at 4 o'clock on a Friday afternoon." We were all relieved to read later that the Court of Appeal said too high a standard had been set by the trial Judge bearing in mind that it is always necessary in deciding whether or not a professional man has been negligent on a particular occasion to consider the circumstances of the moment and the problem that has to be dealt with. This in effect may recognise something of a locality test. It is clear that the facilities for testing research and treatment available to the professional man on the occasion in question must be taken into account.

Does insurance result in the standard being set at a higher level? There can be no question to my mind, whether the mode of trail is before judge or jury, that the fact that everyone today knows that the prudent professional man has insurance against negligence tends to result in verdicts or judgments being given which would not have been given before the practice of insurance became widespread and well known. Insurers endeavour to combat both this and the greater tendency for people to claim when they know the professional man is insured by including conditions that the fact of insurance shall not be revealed. They do little to help. The result is something of a vicious circle like that of inflation. The more claims which succeed the more widespread becomes the practice to insure and the number of claims multiply more and awards go higher than they would have if insurance was rare.

There is no question to my mind that the setting of too high a standard is to the disadvantage of the public as well as the professional man. There is the obvious result that increased premiums are passed on where possible in higher charges, but the detrimental results are more widespread. The lawyer plays safe and advises the obvious and well tried path when a more enterprising or novel approach would have been to the client's advantage. The accountant and the engineer do the same. The doctor refuses to adopt new techniques even though sure of the benefit that would result.

5. In relation to negligence claims, with every different profession there are many special considerations to be kept in mind.

As regards the medical profession, the science is necessarily an inexact one with huge fields of unexplored and unknown territory still remaining. There is constant research and scientific advances with constant debate as to the merits of one drug or one operative technique against another. The Courts in recognition of this while judging harshly any indication of experimenting with the patient have said that if there is a substantial established school of medical opinion supporting the course the doctor took he will not be held negligent even
though perhaps because of some unknown peculiarity of the particular patient it
did harm to him and even though there is a large body of opinion the other way.
Then there is the very large question of the consent to operative treatment and
the duty to advise and warn — the “informed consent” as it is called. This arises
in the case of surgeons because of the law that every interference without legal
justification with the person of another is an assault for which the surgeon may
be held criminally liable.

In Smith v The Auckland Hospital Board 1964 N.Z.L.R. 241 and 1965
N.Z.L.R. 191, the consent to operative treatment in the usual form had been
duly obtained, but the hospital was held liable because the risks had not been
sufficiently explained. There is authority both in England and America and in
Smith’s case itself for the proposition that the surgeon need not go fully into the
risks involved where to do so would unduly alarm an apprehensive patient. An
English reviewer, I would mention, has suggested, perhaps with justification, that
a jury finding against the surgeon would probably not have been made in Smith’s
case but for the dramatic circumstance presented of a man who went into
hospital for treatment of a cardiac condition and came out without his leg. The
topic is far too wide a one for me to expand upon here.

As to accountants and auditors a prescribed test today should certainly be
the 100 page judgment of Moffat J. in Pacific Acceptance Corporation v Forsyth
& Ors. 92 W.N.N.S.W. 29 — the $150,000 judgment which put the cat among
the pigeons in the field of professional negligence in Australia and New
Zealand. Perhaps the two most salutary warnings provided by that case are that
(1) where he can verify further the auditor should never be content only with
the assurance of any one, however exalted his office in the company or
organisation or however highly regarded and respected he may be, and (2) that
there is a duty in the case of company auditors to report to the directors
immediately and to the company in general meeting any irregularities or
suspicious circumstances encountered and this duty must not be shirked even
though it may be thought to involve a reflection upon the board, a director or a
senior executive and even though it may be thought that public disclosure will
do the company harm.

Valuers and appraisers are particularly open to claims because it is so easy
for them to miss some point which detrimentally affects or enhances value and
there is always the question as to how far they should go in endeavouring to
ascertain whether there are hidden defects. Woolbridge v Stanley Hicks, 162
Estates Gazette 513 a 1953 case in England, illustrates these difficulties. There a
bank asked to finance a possible purchase had sought the valuation and gave the
instructions to the valuer in a letter with a postscript saying that the proposed
purchasers desired that particular attention be paid to the matter of possible dry
rot and woodworm. The premises were occupied by tenants, furnished and
carpeted. The defendants were not readily able to make a thorough inspection
and reported that a superficial inspection revealed no evidence of dry rot. They
were nevertheless held liable to the purchasers who went ahead and bought and
then found extensive dry rot.

Architects and engineers are similarly very open to claims and when they
err or are held to have fallen short of the standard, the claims are, of course,
liable to be very large ones. They have the invidious task of trying to anticipate
just what conditions are likely to arise which may affect and the soundness of
their designs when they come to be put into effect and the tendency of everyone to be wise after the event is always likely to operate against them. The case of *Karori Properties Limited v Jelicich Austin & Co.* 1969 N.Z.I.R. 698, illustrates an unfortunate weakness in their legal position which arises from the fact of liability in these cases being purely contractual. A firm of architects sued because of the development of large scale leaks in the walls of a brick building sought to join the builders as third parties in the action alleging use of poor mortar and insufficient compacting of cement as it was poured. Their application was dismissed because the builders could not be classed as joint tortfeasors and there was no contract between the architects and the builders. The architects had no way of compelling the owner to sue the builder.

As regards quantity surveyors theirs may be seen as a fearsome responsibility with the hundreds and hundreds of calculations which may be involved and the thousands or even millions of dollars which may be involved, *London School Board v Northcroft* (1889) Hudson’s B.C. 8th Ed, provides some comfort, however, in showing that where a great many arithmetical calculations are involved an inadvertent or occasional mistake will be insufficient evidence to establish negligence.

Persons who hold themselves as specialists or experts in their own particular field, of course, set for themselves a higher standard than applies to their profession generally. This, of course, operates very much to the benefit of the general body of their profession who may avoid responsibility by taking the opinion of such experts and who are not required to measure up to their standards.

Barristers fall into a special class as was recognised by the House of Lords in *Rondel v Worsley* 1969 A.C. 191 and cannot be sued for negligence in the conduct of litigation. It is commonly thought that this specially privileged position was secured by reason of their preserving a sort of fiction that their services were not charged for in the ordinary way and their fees cannot be sued for and are a kind of gratuity. This, however, is not the real reason at all. There is, indeed, authority in New Zealand to indicate that they can sue for fees (*Robinson & Morgan-Coakle v Behan* 1964 N.Z.L.R. 650). The real reason for the immunity is the adverse effect that accountability by a barrister would have on the administration of justice. Apart from the inhibiting effect on the counsel’s conduct of a case and the adverse effect on the principle that a barrister’s duty to the Court transcends his duty to his client, nearly every unsuccessful litigant would be presented with the opportunity of trying to get a retrial of his case by suing his counsel for negligence in losing it.

It is to be noted, however, that in all nonlitigious matters, *Rondel v Worsley* made it clear that the barrister has no immunity either as regards his client or under the *Hedley Byrne* principle.

In the absence of actual bad faith or wilful misstatements an expert called as a witness cannot be held accountable for a mistake he makes in the course of his evidence and his position does not differ from that of the ordinary witness.

It is of some importance to mention here, however, that where a professional man for reward has furnished a report or opinion he can be held liable in the damages if he fails to attend Court when required to do so to give evidence. There are a number of reported instances where a plaintiff has recovered in this way by showing that he lost his case or recovered less because
of the non-attendance of the expert witness.

6. In the law of tort it is the Courts which define the area of actionable negligence and there can be no question that the years since World War II have seen very great extensions with the Judges, instead of as formerly requiring that the case be brought within one of the established situations where liability has been held in the past to exist, saying openly that the field is limited only by questions of public policy which they themselves will lay down. *Hedley Byrne* itself was, of course, a conspicuous example of an extension of the ambit of the duty of care, but there have been numerous other less far-reaching but nevertheless costly extensions. *Best v Samuel Fox & Co. Limited* 1952 2 All E.R. 394 drew attention to the fact that the duty of care must have some bounds as to the persons to whom it is owed. If the owner of a business employing a thousand people is killed by someone’s negligence, are they all to be permitted to sue because as a result the business is closed down and they are put out of work? If you run over a man and prevent him from going to where he was going to negotiate a million dollar contract, what is to happen?

Notwithstanding the warning note sounded in *Best’s* case by such wise and experienced judges as Lord Porter and Lord Reid, there has been one extension after another recognised in the scope of the duty. To quote but one in England — *Schneider v Eisovich* 1960 1 All E.R. 169 — relatives who had incurred air fares and hotel expenses travelling to visit an injured person in another country were enabled in an indirect way to recover these. In *Wright v Cooke* 1967 N.Z.L.R. 1034 parents directly recovered travelling expenses incurred in visiting their injured child on the ground that this was of importance to the child’s recovery. Whether the matter is viewed as turning on the extent of the duty or on principles as to remoteness of damage does not now seem to matter very much because in either case the tendency of the Courts is to look at the matter just as a social question — should or should not this plaintiff recover damages?

In the same way the introduction of the “foreseeability” test in place of the “direct result” as regards the type of damage which may be recovered has brought in a large number of heads of damage which would formerly have been excluded.

In a review of a case which effected yet another of these extensions in the scope of the duty of care, a contributor to the Cambridge Law Journal (1965 at p. 186) began his article thus: “A French jurist has foretold that the law of tort ‘A French jurist has foretold that the low of tort will die of hypertrophy: it will blow itself up like Aesop’s frog in the self important attempt to make everyone liable for everything.”

7. *Spartan Steel and Alloys Limited v Martin & Co. Limited* (1972) 3 All E.R. 557 is a recent example of how a tort-feasor can today be held liable not only for the physical damage he has caused to the property of another, but also for loss of profits thereby resulting — something which, of course, opens up the possibility of claims of stupendous size.

As to the quantum of damages we all know that awards are constantly escalating. One point I would mention in relation to the increasing number of claims and increasing damages is that most lawyers experienced in the field of personal injury claims foresee that when the Accident Compensation Act comes
into force there is likely to be a substantial increase in the number of public liability and professional negligence claims arising out of personal injury — particularly against doctors and hospitals. In the United States the biggest awards of recent years have been against doctors, hospitals and drug manufacturers and the bonanza of a large lump sum damages claim will always have more attraction than any weekly state-paid pension. In a recent case in the State of Florida a small boy secured an award of 1¼ million dollars against a private hospital.

8. What is the precise nature and effect of the contract which the professional man enters into by accepting instructions or agreeing to treat someone for a fee. Except where it is complicated by the existence of other elements referred to it is submitted that it is basically no different from any other contract. It requires two consenting parties. A doctor is under no obligation to treat anyone and everyone who seeks his services. It may well be in particular cases, however, that it is a contract to perform services personally and not by delegating to anyone else. In such cases it cannot be assigned or the performance delegated. A more interesting question is whether a term can be incorporated in it limiting the professional man’s liability for any want of care or skill. This is a question upon which I have been able to find little in the way of authority beyond some reference to recent cases in American Courts where it has been held that such terms are in the case of medical men invalid as contrary to public policy. It is difficult to see why this should be so when carriers of goods, shipping companies and airlines are able to do so and have statutory approval and recognition of their so doing.

Charlesworth Negligence, 5th Edition (1971) p. 675 says a duty which is imposed by common law or by statute for the protection of a particular person can in general be waived. He goes on, however,

“... In the case of a common law duty contracting out is permissible unless it is against public policy ... there does not appear to be any instance in which it has been held that contracting out of liability for common law negligence is contrary to public policy.”

As to the liability of partners the only point here which time permits me to mention is that a retiring partner should take particular care to see that insurance is maintained which will still protect him after his retirement. A change in the new firm’s insurance cover may leave him entirely unprotected. It may even be necessary to keep an existing policy in force and renew it from year to year until the six year period of limitation has expired.

9. Vicarious liability and the position of professional persons in salaried employment can create special problems. As has been mentioned the contract may be expressly or impliedly a personal one which permits of no delegation at all. Professional practice or trade custom will be of importance here in determining just what is to be implied where there are no written terms. In a recent case, Moresk Cleaners v Hicks 1966 2 Lloyds Reports 338, however, an architect was held liable for defective design of a building and the architect’s plea that it was an implied term that he could delegate specialised design tasks to qualified sub-contractors did not avail him.
10. Where an expert acts as an arbitrator or in any semi-judicial capacity he ceases to have a duty of care to the person employing him and provided he acts fairly and honestly he will not be held liable to either party through lack of skill, ignorance of the law or any negligent conduct in that capacity. He will, however, be liable for fraud or collusion (see Madge — Professional Negligence (1968) p. 17).

11. The subject of pitfalls into which the professional man may fall in relation to indemnity insurance is also too wide a topic for me to do more than touch upon. It is extremely important, however, to note that the forms of policy issued may vary fundamentally. The policy may be issued on the basis of covering — (1) claims made during the currency of the policy regardless of when the actual negligent act, error or omission giving rise to it actually took place, (2) claims made for negligence committed during the currency of the policy only or within a limited or unlimited time after it has lapsed. It would be very difficult today to find an insurer willing to agree to be liable for claims arising at any time in the future and the first form of policy is that which is now usually encountered. The important thing to note is just what the position is in this regard and to remember that in the case of the first form I have mentioned all protection is lost once the policy is allowed to lapse because the provision made is for indemnity in respect of claims made during the period specified in the policy. This, of course, will be usually the period of 1 year covered by the premium. Particularly to be watched is the situation pertaining when a change is made from one insurance company to another.

A further point which must always be kept in mind is that the usual form of policy provides indemnity only in respect of negligence occurring in the course of the policy. Any claim arising through the professional man having gone outside the scope of those duties will not be covered by the insurance. Thus a solicitor giving gratuitous advice outside the ordinary course of his practice and rendering himself liable under the Hedley Byrne principles will find that his insurance policy provides him with no protection.

A further pitfall was illustrated in the case of West Wake Price & Co. v Ching 1956 3 All E.R. 821. This case concerned the Q.C. clause — a very valuable provision from the point of view of the insured because under its terms the professional man is not obliged to contest the case in Court unless a Queen’s Counsel whose appointment is agreed to by both parties advises that the proceedings should be contested. In the case referred to, however, the accountants concerned were held not entitled to rely on the protection of this clause because the proceedings were framed both on the basis of negligence and as a claim for money had and received.

A further important point to watch is that the limit of indemnity usually provided is an aggregate limit for any period of insurance. It follows that upon payment of a claim the indemnity stands reduced by this amount until the next renewal date. To obtain maximum cover, therefore, the indemnity should be immediately reinstated to its previous limit.
QUESTIONS ADDRESSED TO MR M.H. VAUTIER

Question:
Mr Tompkins:
Asked about contributory negligence where there had been a breach of contract by a professional man.

Reply:
Mr Vautier:
My understanding of the position would be that this is indeed the situation. Certainly where the claim rests as it so frequently does solely in contract. There is just no room then for any notion of a plea of contributory negligence. Was there a breach of contract? Was there not? Solely that. And if a breach can be established, if the actual breach of the contract is shown, then the damages must flow and the question of the contribution that may have been made by the plaintiff is irrelevant. It may in certain circumstances affect the quantum of the damages. It won’t affect the course of the action and it won’t be a case where a plea of contributory negligence can be pleaded and the Contributory Negligence Act applied to it.

Question:
Mr Bendon:
Asked what degree of protection would be afforded a solicitor whose advice is proved wrong if the client has not sought the second opinion recommended by the solicitor at the time of giving the advice.

Reply:
Mr Vautier:
That would be one of the circumstances to be taken into account to which Mr Justice North referred in the case I mentioned. It would then be a question of whether it could be shown that the solicitor had fallen short of his duty in the particular circumstances. He has given the warning to the client that this is a difficult matter on which he would like some other opinion and I think this would go some distance towards protecting him. That plea may not succeed but it would certainly be one of the circumstances to be taken into account in judging whether he falls short.

Question:
Mr Bailey:
Particular professions are subject to special considerations. For instance over a vast number of calculations the quantity surveyor would not be held liable for small errors in addition. Would the same latitude apply to a structural engineer?
Reply:

Mr Vautier:
That is a curly one because the situations are rather different. All that can tend to happen with the quantity surveyor is that there is going to be a pecuniary loss to the extent of some miscalculation he has made. The case I have mentioned was a case where some hundreds of pounds was lost because of these several small errors made by the quantity surveyor. Where the calculation is going to affect the stability of a building there would be different considerations apply. If it was going to be an important one then certainly it would have to be checked and re-checked and would not be in the same category.

Question:

Mr Speedy:
What is the position of the company employee. Is the individual liable as well as the company?

Reply:

Mr Vautier
I think the answer to that goes back again to this question of contract or tort. If the action is one that can be framed in contract only then the employee won’t be able to be sued because the contract will not have been made with him. It will have been made with his employer. He is responsible for the action of his employee. But if it gets into the Hedley Byrne area I would think the answer is the opposite way. If you can frame it outside the contract altogether and frame in tort anyone is liable and the employee himself could be sued in my view.

Question:

Mr Adam:
Where there is a substantial delay between the accruing of the damage and the case coming to court and there is an escalation of costs as far as rectifying the damage is concerned, is there a rule that can be applied in the assessment of damages? Should they be assessed at the time the damage occurred or at the time of judgment?

Reply:

Mr Vautier:
In breach of contract certainly one goes back to the time of the breach. And I think the answer would be much the same in tort also, but of course because the damages would be fixed at that stage it is a question of the time when the cause of action arises in each case and that may differ and the situation thereafter should be a claim for interest which can be made from that time onwards until recovery.
SECOND SESSION
INTRODUCTION TO 2nd SESSION

by Mr R.R. Ladd

Having heard the prospect of the Law as related by Mr Vautier you will wonder where this is leading you to. I will introduce to you Mr Donald of Bowring Burgess Limited, a subsidiary of one of the world’s major broking groups, who will speak to you on the effects of insurance trends in New Zealand and overseas.
PROFESSIONAL INDEMNITY INSURANCE TRENDS NEW ZEALAND AND OVERSEAS

by
Mr D.L. Donald

Introduction

My topic is Professional Indemnity Insurance trends, New Zealand and overseas. I am sure the controversial trend has been the increasing cost to the profession since 1960.

I hope to give some opinions and facts on the reason why these costs have risen, and describe the very active steps which have been taken world wide by the professions, their brokers and insurers to provide cover at a cost which fairly measures the risk.

Winston Churchill is said to have described insurance as the magic of averages that comes to the rescue of millions.

The past 10 years have been very much a “learning period” for the professions and the insurance market regarding Professional Indemnity and I believe a major problem in New Zealand is that the averages have not been calculated over sufficient numbers or over sufficient years to give any real benefit.

We estimated a few years ago that only about 50% of the firms in New Zealand were insured at all, and then for very modest figures.

Today, I would expect some professions to be 80 - 90% insured with the consequence that sufficient statistical data should become available to even out the humps and hollows.

But this can be no magic wand and it is going to take continuing effort from all parties to build on the lessons learned to date, and be prepared for the lessons yet to be learned in this evolutionary and uncertain world.

And what lessons have been experienced? I can tell you that 30% of the firms of one professional group in New Zealand have a history of circumstances which have, or could have given rise to claims (and I quote), “against them for breach of professional duty by reason of negligent act, error or omission...”

The statistic of 30% arises from a study of the professional indemnity insurance proposals of about 400 firms, and the words quoted, are from the operative clause of the one of the standard professional indemnity policies. As of interest two smaller groups show claims circumstances in 41% of their proposals for one profession, and a very creditable record of 11% in the other. These are 3 relatively major professional groups.

As a feature of modern life, protecting the goodwill and livelihood of the professional firm as well as the interests of the client who suffers loss from the negligent act of his adviser, it is important to appreciate that the insurance covers liability at law – not moral liability, and the circumstances revealed by these proposals have frequently resulted in unavoidable claims of magnitude.
Underwriting Attitudes

I have chosen the following quotation from an insurance publication, to set the scene for this discussion on trends during the past 10 years:-

“Professional indemnity is not a class of business which is sought by insurers because of the problems of underwriting and claims settlement to which it gives rise.”

Many reasons contribute to this attitude. One is that the cover is wide under a professional indemnity policy not being limited to claims for bodily injury or property damage as is the case with the well known public liability policy.

Another is that insurers do not wish to become involved too much with what may be called the business or trading risk. They are prepared to cover a claim due to some accidental or fortuitous event, for example, some foreign body entering a product during manufacture, but they are reluctant to become involved in covering business knowhow.

This is a reason that the majority of standard public liability policies and their product extensions, exclude liabilities arising out of errors in advice, design or specification. The implications of this exclusion are not adequately appreciated by the business community at large.

The professional indemnity insurer does cover business knowhow, and is virtually guaranteeing the competence of the insured.

The underwriting manual of one substantial insurance company in New Zealand contains the following instruction:-

“We emphasise that we are not willing to write professional indemnity insurance except for solicitors and accountants where underwriting factors permit insurance except for solicitors and accountants where underwriting factors permit and where there are good commercial reasons for so doing.”

This specific quotation also demonstrates the much wider attitude among insurers and, I trust the comments which follow will give some understanding why brokers and practitioners have had difficulty in finding willing underwriters over recent years.

Some History

Historically, professional indemnity insurance is regarded as having been introduced by Lloyd’s in the 1920’s. There was little demand for cover, and few problems with premiums until the 1960’s when legislation, complexity of modern business, publicity of claims and a developing claims consciousness of the public brought about drastic changes to the insurance world.

Many professional Societies and Institutes became aware of a hardening in the attitude of insurers towards professional indemnity insurance, and undertook detailed surveys of their members. Reference to the 1963 survey of one of our larger schemes shows there was widespread interest by members, but a marked lack of consistency in their insurance arrangements.

The survey, carried out 10 years ago, disclosed that sums insured ranged mainly between $4,000 and $20,000 with a nominal few members having covers of $20,000 to $50,000.

Today, a similar survey reveals sums insured ranging from $30,000 to $2,000,000, with the majority maintaining policies of $50,000 to $100,000. In my view $100,000 should be the minimum.
In 1963, the premium range was from as low as $7.50 for a cover of $10,000 in one case, to $200 for $50,000 in another. Today we see premiums ranging from $150 to $10,000 or more in this scheme.

In other New Zealand professions, modern premiums quoted can range from $100, to in excess of $40,000 per firm.

During an 8 year period of the scheme, a claim was recorded for every 4 clients. Many of these claims were very small, and in line with most other professional indemnity schemes, a compulsory excess of $1,000 was introduced. Many similar schemes require the firm to carry varying proportions of each claim. One Australian scheme requires a contribution of $2,000 and another international arrangement in which some New Zealand firms participate, sets the amount at US$25,000.

Under current conditions the insurance market will be more flexible on this issue, but there has been a strong feeling in the Societies themselves to maintain the provision of a mandatory excess of at least $1,000 to ensure the maximum effort by the practice in its risk control.

As a result of these trends, some practitioners have developed groups and funds to share the cost of any policy contribution incurred by a member. Such groups frequently involve themselves in claim consultancy to aid members, and if necessary, I presume they would take disciplinary action.

These groups have thus embarked on a limited form of co-operative underwriting in conjunction with the insurance market and will share the fortunes of claims experience which follow.

Their loss potential for any one claim is limited but their major risk is the possibility of a series of claims in one year. Recent history has not helped define this risk or occasion alarm and I know of only a few cases which might have had an adverse effect, such as, for example, where more than one claim has been notified by one firm during any one year. In one bad case there were a series of claims against a firm as a result of a partner’s illness and even now a few have not yet been fully revealed.

**Some Claim Causes**

In considering the number of notified claims, it should be remembered that each one represents the circumstances of an error, or an alleged error, which could be quantified into any amount at all. From an underwriter’s point of view, the disclosure of the frequency of claims in a practice gives serious ground for concern. Mr Vautier has expanded on some specific cases. I hope to expand on others a little later.

You may well ask what type of claim occurs. Incidents of error or negligence can occur in everything that is done in the practice. Of utmost worry to the underwriters have been occasions of gross negligence amounting to recklessness, where for example one practitioner advised a client to commit an illegal act.

In other cases, practitioners have advised clients to undertake speculative investments, and in others where the practitioner has informed clients that they are insured against professional negligence and generally encouraging them to make claims.

An activity of concern, which to some degree appears to be diminishing now is where an adviser has been acting for two interested parties.
A recent study of our records of a scheme was aimed at categorising the causes of claims. I believe similar information will be revealed in other professions and one significant area in all practices will be failure of basic management or administration methods.

The scheme reviewed showed 31.4% of claims circumstances notified arose from causes such as:-

- failure to communicate with clients
- failure to supervise
- inadequate filing systems
- breach of confidence
- inadequate diary control

Last year, in a similar address, I said that a number of possible claims have been recorded for estimates in the vicinity of $60,000 to $70,000. Today, this range must read $70 - $80,000, an odd one up to $200,000, and a number in the vicinity of $30,000.

Thus we see the gradual scaling up of exposure. And many of these circumstances have resulted from relatively ordinary activities, in relatively ordinary practices.

**The Changing Scene**

In January 1971, the world professional indemnity market underwent a substantial review. This affected all professions in New Zealand, and some are still reeling from the effects. Liability reinsurance agreements were amended to exclude or restrict the risk of professional liability claims on the reinsurers, and the few specialist underwriters left, completely updated their rating structures and underwriting methods.

These events resulted from a loss of insurance capacity and world wide reaction to publicised claims such as the Australian case, *Pacific Acceptance v Flack & Flack*.

This case incidentally appears to be one containing a similar mismanagement ingredient to those mentioned previously. I have seen the claim described as having arisen out of failure to check that mortgages were executed and registered as intended and to check that a solicitor was instructed to act in the transaction. The claim was settled for $1,500,00 (plus costs reputed to be an estimated $500,000).

In New Zealand, a recent case remembered as receiving wide publicity is *Bevan Investments v Blackhall and Struthers*, which arose from defects in a squash courts construction at Porirua and was settled late last year for $129,000. The original claim was for $185,000. Knowledge of these events has an unsettling effect on insurance underwriters who cannot help looking over their shoulders when figures of this magnitude are being displayed to other potential claimants.

**The Increasing Scope for Liability at Law**

For many years, there has been the fond hope, that New Zealand claims experience would prove to be superior to those of overseas. To some extent, particularly in the size of recorded claims, the signs are promising. Nevertheless, it is proving more and more difficult to separate our position from that developing overseas.
Local practices are engaging more and more with international connections and this naturally insinuates many overseas attitudes into our local scene where for example, we have a claim from an overseas parent company against a New Zealand practitioner for alleged negligence in attending to the affairs of a local subsidiary.

Thus has the scope of potential liability increased progressively. Court decisions, such as *Hedley Byrne & Co. Limited v Heller & Partners Limited*, changes in modern business and professional techniques allied with greater complexity of work undertaken by the professional firms have all contributed to the changing insurance scene of the past years, in New Zealand and elsewhere.

The *Hedley Byrne* case altered a traditional feature of professional liability insurance. When the Professional Indemnity policy was originally devised the professional man was liable only under contract to his client. The *Hedley Byrne* case established that the professional man who gives guidance to others owes a duty of care not only to the client who employs him, but also to others who are relying on his skill to save them from harm. And so the scope of cover needed is wider than initially contemplated.

A recently reported U.K. claim for an amount in excess of $2,000,000 further exemplifies this principle. This is also against an accountant, who, it was alleged, had persuaded a bank on the basis of draft accounts to advance money to a building contractor who subsequently went into liquidation. The claim was against the accountant for recovery of the monies loaned by the bank.

The trend continues in New Zealand and we have claims circumstances on record involving claims from parties not clients of the insured, thus firmly establishing the effects of *Hedley Byrne* in New Zealand.

Case law is still increasing professional liabilities, and the cost of claims. Fundamental changes in recent years increasing the cost of claims included the allowance for interest on damages. "*Dutton and Bognor Regis United Building Company Limited*" of 1971, for the first time sustained a case against a District Council and it's surveyor for negligence in approving foundations on a reclaimed rubbish tip which subsided causing a wall to collapse.

This raises the issue of commercial employers of professional men, and also the personal liability of the salaried professional man. It is uncommon for a commercial organisation to insure, or to find insurance readily available for the risk of professional liability claims.

But how many could be exposed to claims through the special activities of their accountants, solicitors, architects and engineers? And how many of these employees have their special skills relied upon by others, and attract a personal liability?

Some commercial organisations do seek cover, but this is rare indeed, as it is for the employed professional to obtain indemnity for his work outside in secondary employment or voluntary work.

Creditors and others losing money on investments are more and more seeking recovery from anyone possible. In the case of bankruptcy, the auditor, secretary, accountant or solicitor may be the only solvent source of possible recovery left. This is certainly happening in New Zealand as well as overseas.

As case law and commercial practice changes so does the work and responsibility of the professional man. The accountant is giving financial advice,
or acting as a management consultant, the architect is doing work bordering on that of the engineer, and the solicitor is acting as a director of companies and fringing on the commercial field, to name but a few.

The development of umbrella partnerships and agency arrangements with resultant inter-partnership liabilities provides a complicated challenge to underwriters and the firms involved.

Thus the scope for claims has widened considerably. The underwriter too often finds he is insuring a liability newly imposed by the courts or the new venture of the professional man which he never envisaged and without any idea of the implications.

The Capacity Problem

Now I will refer to the problem of premium cost in relation to the capacity of the insurance market to accept risk. Briefly, where there is capacity to place insurance, there is competition. And where there is competition, there is hope for lower premium.

During the past 10 years the world wide insurance market has been severely shaken with widespread losses of profitability. In a nutshell, that was the problem in 1971 when markets collapsed and premiums escalated.

There was a dramatic loss of capacity, and therefore a reduction in the number of insurers available to underwrite professional indemnity insurance.

The capacity problem existed, and to some extent still exists in all major industrial countries of the world, affecting all classes of insurance and reinsurance.

And why does a capacity problem exist?

I have seen the following given as a simple reason:—

"Capacity is a mathematical function of risk capital. The return on the risk capital of the insurance industries of the most sophisticated countries has been pitifully low for many years and operating profits have in the main been derived from healthy investment income offsetting poor results."

And what brings about the lack of profitability, capacity, and higher premium cost?

Broadly speaking it will be adverse claims experience and increasing expense cost factors.

The expense factor needs no elaboration being the common malady of every business.

Adverse loss experience appears to arise from the rapid development of new manufacturing, scientific professional and management techniques, allied with the sophistication of equipment which brings about more intense accumulation of values and consequent exposure to major loss. These developments, allied with the legal decisions imposing unforeseen liabilities such as Hedley Byrne, could, from time to time, outstrip the knowledge of both insured and insurer, and a commonly expressed opinion has been that a good deal of experimentation has been done at the expense of insurers.

Certainly the introduction of new materials and construction ideas has been the “Archilles Heel” in some architectural and engineering claims on record in New Zealand.
The Effect of Reinsurance

The capacity problem of the mid 60’s has produced an interesting trend in the world wide insurance market through the closer oversight by reinsurance companies. In fact we have ourselves negotiated terms with reinsurers upon whom the direct underwriter relied for guidance.

The reinsurer has had the same problems as the direct underwriters, and has pursued the same solutions.

Changes in reinsurance techniques have also affected the capacity of underwriters to underwrite professional indemnity insurance.

A major company in New Zealand at one time had reinsurance treaty facilities which paid for claims in excess of $10,000. New arrangements require the local company to retain $200,000 before having the protection of reinsurance. This means the local branch manager would have to commit his branch to a liability of $200,000 for isolated cases of an acknowledged difficult class of business, and one in which he would have little if any experience.

He will therefore not accept the risk because the skilled underwriter is aiming for a balanced book, which implies that he is trying to avoid big exposures, or at any rate not over extend to the point of exposing his account to shock losses.

The Remedial Action of Insurers

Can we now look at the remedies the insurer can take to restore both capacity, profitability, the confidence of his reinsurers, and ultimately stabilise premium cost to the benefit of the insured.

Mergers

One answer has been to merge companies. We have seen a number of these over recent years, resulting in rationalisation of corporate expenses and assets. But mergers have appeared to reduce risk taking capacity, competition, and consequently the scope for independent thought and enterprise, much needed elements in the writing of Professional Indemnity business.

The Individual Underwriter’s Solutions?

My own view is that the solution to profitability usually comes down to the individual underwriter, or the branch manager, the one person vested with the responsibility to make a profit for his company, and with a desire to gracefully reach retirement and draw his pension.

He anxiety is to keep his house in order and he will therefore follow certain courses of action.

For example, he will endeavour to increase rates. He will scrutinise exposure and select risks much more carefully. He will pay more particular attention to the breadth of the cover given by his policy contract.

He will study the expense costs of servicing his business generally and classes of insurance in particular.

Finally, if he cannot get the rates, conditions and expense factor his experience dictates, he will withdraw from participation in the unprofitable or difficult class of insurance.

From this broad outline, and from the experience of the past, professional
indemnity insurance is a class that is first effected. This is because it has a high exposure potential, insufficient background of statistical experience and liabilities which are to some extent still in an evolutionary state.

Specialist Markets do Provide Capacity

Fortunately, specialist markets do provide necessary cover, at terms developed from world wide and geographically defined experience. But how limited is this market? It was reported in 1970 by the Journal of the Institute of British Architects, that there were only two Lloyd’s syndicates, and two tariff companies operating actively. This is not necessarily correct today, but the scale of participation is just as minimal both here in New Zealand and overseas.

You will appreciate that this gives very little choice, and very restricted competition. The broker must use all his skill to buy the insurance for his client for the most reasonable cost and terms which is his duty at all times. Nevertheless, from the point of view of security, and stability, it is important that these companies and underwriters continue to build their facilities. As profitability (hopefully) returns to the market, we can expect to see new underwriters venture into the field, but it is important that they plan to “stay the course”. It is an unfortunate fact of insurance history, that undesirable fluctuations are brought about by those who dabble for a short time and withdraw or those who extend their capacity and fail financially leaving unprotected clients floundering in their wake.

And I would also quote further from the same architectural journal to show that specialisation does not automatically ensure successful underwriting:-

“From an examination of the financial returns, the RIBA solicitor can confirm that the Lloyd’s syndicates lost far more than £100,000 last year as a result of claims settled exceeding premium received, and this figure takes no account of claims still pending at the end of the premium accounting period.”

The RIBA has been advised that the two insurance companies have been facing similar losses.”

And so the capacity problem has reflected seriously on professional indemnity insurance and the premiums to be paid by the practitioners.

The Premium Trend

Obviously the underwriter will seek premiums sufficient to meet claims paid and to provide for those which are outstanding.

Until 1969 most premium scales were reasonably level, some increased and others remained static, and some even gained concessions such as for architects for whom we were able to negotiate an improved discount of 30%, which held until the cataclysmic changes of 1971.

The year 1969 introduced the first effective changes particularly for solicitors and accountants as the upward trend of New Zealand claims began to be felt.

For example may I quote from the records of one scheme which shows that since 1969, rating increases have affected firms such as these:-
A firm with one partner, 2 staff — indemnity $50,000
  in 1965 paid $146.00
  in 1969 paid $174.00
  in 1972 paid $337.00

A firm with 4 partners, 13 staff — indemnity $100,000
  in 1965 paid $338.00
  in 1969 paid $517.00
  in 1972 paid $836.00

Incidentally, for this profession, the 1972 premium took an average 95 cents of each $100 of gross fee earned.

I am pleased to say that the 1973 figures have remained stable, but this is a feature very much under review by both Societies and underwriters.

The Problems of Premium Rating

At this stage, it is submitted that underwriting experience has not yet been gained over a sufficient length of time to provide adequate data to achieve true stability. While we do consider it desirable to isolate New Zealand experience, we must remain aware that purely local schemes may prove to be over sensitive to the effect of major claims through lack of premium volume.

A leading underwriter has stated that in his view a 5 year picture is required to judge the approximate ratio of claims to premium, and that even this should be adjusted to reflect results from the last three years, together with, we might add, the prognostications for inflation over the forthcoming years.

The following example of a local liability insurance fund may help demonstrate the unpredictability of a short period comparison. The figures were calculated at irregular intervals at critical times of review and negotiation, and indicate the extreme fluctuations arising from claim notifications that upset the most optimistic predictions. I will give you the net loss accumulated each year and the percentage ratio of total claims incurred to net premiums.

The fund built up over a number of years but we will take the last 5 periods during which the various negotiations took place:-
  Period 1 Net Loss ($5,000) Loss Ratio — 107%
  Period 2 Net Loss ($38,000) Loss Ratio — 130%
  Period 3 Net Loss ($162,000) Loss Ratio — 170%
  Period 4 Net Loss ($127,000) Loss Ratio — 149%
  At Period 4 the fund ceased accepting business, claims notification ran down, and as claims were received or settled, period 5 came into profit:-
  Period 5 Net Profit (+$101,000) Loss ratio — 72%

This was encouraging, but in period 6 we can see the effect of latent notified claims not previously provided for in the estimates. Thus; Period 6 Net Profit reduced to (+$63,000) (from $101,000) and loss ratio increased to 80% (from 72%).

Continuation of the scheme at increased rates should have confirmed profitability but as I have said before potential claims of $70-$80,000 are on file and the reserves accumulated need to be more substantial to iron out the humps and hollows in experience.

Other schemes show similar patterns. As a broker, one remains hopeful for the future, but lurking in the back of the mind is an awareness of those inactive claims.
Providing for Outstanding Claims

A real problem in rating therefore, is the delay in settling claims, and thus arriving at true statistical results. In fairness, these delays are rarely caused by underwriters.

After all, the whole question of liability is a delicate one, and requiring a clear analysis of the original act, which might have occurred many years before, to the preparation and proof of claim by the claimant and subsequent negotiation and proof of loss. Following this can be the inevitable delays of court action should this be required.

To demonstrate the time frequently required to achieve justice I would mention the example of a claim in New Zealand arising from arrangements concluded early in 1960, and resulting in a failure in 1970. Legal action was not effected until 1973. A further action, depends entirely upon the result of the first litigation which is still in hand. 13 years have now elapsed since the original act of alleged negligence, and the case is far from concluded.

There are others in similar vein, for an example, where contributory negligence is involved. We did have a case where a plaintiff was injured by a falling fixture. The employer paid a fixed amount of compensation and the balance was divided as being the responsibility of the main contractor who paid 50%, the consulting engineer 25%, and the architect 25%. This negotiation was necessarily complex and lengthy.

Thus, the provision for outstanding claims is a major problem in any liability insurance or fund. The prudent underwriter must create reserves to pay claims and he cannot ignore any possibility. He will presumably err on the conservative side.

We have records where the underwriter has assessed that no provision was required, but has subsequently paid a substantial claim. A recent claim notified in 1970, with no provision considered necessary has just “come alive” with an estimate of $20,000.

On the other hand, we have seen a reserve of $120,000 created, only to be dispensed with 3 months later. The loss ratios mentioned previously demonstrate these conditions.

An article in Rydges Magazine puts the position quite vividly:-

364.14. “While the $1,000,000 and over cases hit the headlines, there are a dozen cases notified daily in which a claim could arise. Many of these appear insignificant — the majority fizzle out — but there is always the chance that a seemingly minor matter could explode into staggering headlines and the possibility might lie festering in the filing cabinet for years before the participants finally come to blows, stirred to action by the eventual completion of a lengthy and expensive investigation and the looming shadow of the statute of limitations. In cases like these, the underwriters must put away enormous reserves, knowing that while the lawyers are combing and brushing their tactics the eventual bill will more than justify the premiums collected. It can be 10 years and well over before anything like finality looms ahead.”

Inflation

In considering the effects of these problems on premiums we should give some thought to the effects of inflation, a major factor of concern.
In calculating his rates, the underwriter must consider claims results, and the levels of cost likely during this year, and future years.

An article in a British Insurance Publication quoted the increase in personal injury claims for the period 1967 to 1970. Serious cases in 1967 were quoted as being $30,000 to $40,000. Whereas in 1970 the same serious case was quoted at $70,000 to $150,000. I believe New Zealand records would be comparable.

In a more modest comparison, a study of one Professional Indemnity scheme in New Zealand shows that for the 4 year period 1966 to 1969, the average cost per claim was $2,000. The average for the next 3 years, 1969-1972 is $4,000 an increase of 200%.

A comparison of the average fees of 150 firms for one year only 1971/1972 showed an increase of 7%. I have no record of fees prior to 1971 but I presume they would have kept pace with the nominal wage index for professional employees which increased 70% over the period of 1964 to 1971.

I am sure the economists and the accountants will be more skilled at interpretation than I am. General inflation is only one of the factors. Frequency of claims, increasing scope of liability, and the developing skills of claimants to assess their potential award must likewise affect the quantum, and tend to leave the underwriter behind.

**Improving Underwriting Information**

In their endeavours to develop adequate funds, insurers have stepped up their endeavours to measure the risk, introducing new methods of rating, and stricter proposal questionnaires.

A trend in this respect is the adoption of rating on turnover or gross fees, as compared to numbers of staff. This has the effect of building in an automatic inflation factor, and in addition the fees earned from the different classes of work undertaken by the firm help quantify the more hazardous areas of risk as they are revealed.

Efforts are being made to simplify questionnaires but because of the continuing effort required to measure and control risk, adequate information is necessary. As experience becomes more sophisticated one would hope for some relief in this aspect of the insurance.

These detailed questions have in fact resulted in an increasing trend for Underwriters to require assurances on procedures, or changes of office supervision or systems when they consider proposal answers disclose substandard conditions. This undoubtedly arises from their awareness that mismanagement is a major cause of claims.

**Scheme Control & Compulsory Insurance Trends**

World wide, professional organisations, with their brokers, have developed schemes to maintain central statistics and claims analysis to give aid to underwriting negotiations, reduce inequalities, and disseminate the lessons learned to their members.

Compulsory insurance has been seriously developed in parts of the world. Most significantly is that currently proposed for the Law Society in the United Kingdom. A Bill has, I believe, received a second reading in Parliament, and this
will no doubt be closely watched by other countries and professions. Insurers and brokers are co-operating with the U.K. Law Society in this venture.

Continuous research is proceeding from the facts being collated. Our United Kingdom and Australian associates together with our company in New Zealand are closely identified with a number of Societies and Institutes. Regular meetings take place with Society Committees to consider the statistical evidence and lessons being learned.

The type of information unfolding is varied. For example, New Zealand experience and those of other countries is being isolated more adequately and clarified.

**Some more claims causes revealed in Schemes**

A comparison of causes of claims for Accountants in New Zealand and the United Kingdom discloses the interesting fact that 32% of the United Kingdom claims emanated from taxation errors. Our records in New Zealand contain no claims of this nature.

On the other hand, negligence as a receiver or liquidator works out at about 10% in each country.

Of more particular concern to a wider range of professions in the United Kingdom and in New Zealand is the potential for claims from insurance work.

Public valuers, architects and engineers who engage in valuation work have all been exposed to substantial loss. Errors in the valuation of a subsequently destroyed property have had far reaching consequences.

Accountants, solicitors and dare I say it, insurance brokers, have similar exposures. For example, a fork lift was not included in a policy, a woman was injured and the claim for personal injury damages was sustained against the accountant who failed to insure on behalf of his client. The Accidents Compensation Act will possibly have a bearing on all professions in this regard as the personal injury side becomes clearer over the years.

It is reported that the interests of a mortgagee were not protected and the solicitor who arranged the policy was held responsible when the claim for fire loss was declined as a result of breach of policy conditions by the owner.

Many practitioners believe they do not engage in hazardous work.

For example, some accountants consider they have no risk if they do no auditing.

And yet we see claims arising from practices of all types and sizes and from all areas of activity.

Accountants or solicitors have been alleged to have made errors as secretaries or directors. As officers of the company they have special responsibilities and I am aware that a number of professional people are concerned at this aspect of their work.

Debt summons have resulted in libel claims. Failures to detect defalcations have occurred with accountants, and not just auditors. Failure to validate documents is also another frequent cause.

I have mentioned the problems of claims arising from ill health of partners and this could also include staff. This can be a major risk in any business or profession under modern conditions.

The consequences of architectural and engineering mistakes have been well
publicised. Negligence in introduction of new materials and general supervision are common causes of claims, and failure in design seems to be the most frequent.

We have not completely refined our statistics but the following may give some indication to solicitors. About 28% of the number of notified claims circumstances arise from conveyancing work including searches, mortgages, sale and purchase of business and subdivisions. Failure to meet time limits contributes 17%.

Accountants, in a similar survey, show 21% of the number of claims arise from the capacities of secretaries and directors, 32% audit, 10% receivers and liquidators, and about 20% from investment transactions or advice.

Policy Wording Trends

Over the years we have negotiated various changes in policy wordings and currently other innovations are being studied and implemented. For example, and perhaps most importantly is the need for a wider definition of professional capacities to cater for the expanding and modern scope of professional activities. A further point is whether the limitation of the cover to claims in negligence is sufficient, and this is also receiving attention.

Brokers, professional bodies and underwriters are doing their best to develop practical contract wordings. But sometimes I wonder if this is appreciated. Many professional men still tend to ignore the importance of the policy wording and the various extensions which are offered. In fact, the occasional ignorance or lack of concern for the niceties of insurance and basic contract law is alarming.

We still see insurance policies without fully retroactive protection. We have found this extension of crucial importance, as a substantial number if not the majority of claims recorded result from acts which occur prior to the policy period.

There are also some unusual fine print exclusions limiting odd forms of cover offered. We have seen a policy exclude liability if the insured or any employee lose their right to practice, or have declined to belong to a society of their professional brethren, or the act was committed whilst under the influence of liquor or drugs.

I hope there will be an improving awareness of the need for proper contract wording and coverage as Brokers and Societies continue their educational efforts.

Proposal Disclosure

Of equal concern to us is that the professional firm complete its proposal form adequately. That it should disclose circumstances which have caused claims, or which might have caused claims. Full disclosure is essential, and nothing should be withheld. Once again this is a contractual responsibility applying to all forms of insurance, which, if carried out incorrectly, can leave the insured without protection.

Delays in notification of claims sometimes cause a problem and also endeavours by the insured to negotiate without prior reference to the underwriters.
One cannot be too careful. We recently had a case of a client firm which carefully completed the proposal and arranged its insurance. Some time later, a copy of the proposal was circulated to all partners, and to and behold the circumstances of an old claim turned up. This had been completely overlooked, and somewhat belatedly details were provided to the underwriters.

Risk Management in Professional Practice

The concept of risk management, pioneered in the U.S.A. and now evident in New Zealand, emphasising loss prevention and loss control is winning recognition from insurers by way of improved capacity and premium cost in all classes of insurance.

The professions are doing their part as evidenced by this seminar. Advice to members on the use of disclaimers, and limitations of liability are but two examples of the risk management technique in professional practice.

Underwriters have shown willingness to recognise these professional efforts but we often find it difficult to convince them the new innovation is going to be as successful as we and our clients are convinced. You will know how complex the law is on disclaimers. Underwriters have been considering these carefully and one point of interest is the tendency to print too small. I understand case law supports this view but no doubt others are more qualified than I to comment in depth.

I am sure the awareness which has been created will ensure that these efforts at risk management become an automatic part of the training and practice of the practitioner.

Conclusion

I trust I have given you a reasonable interpretation of facts and opinions on the trends of professional indemnity insurance in New Zealand and overseas. Reduced capacity resulting from lack of profitability in the insurance market, and a paucity of adequate data has restricted the potential for satisfaction over recent years.

This situation appears to be improving and we should look forward to some stability in costs and modernisation of terms as experience dictates.

Most professions are in a relatively unique position in that their various organisations and brokers possess more underwriting information than is customary between insurers and insured, and the extensive efforts to sophisticate records and learn lessons, together with the frank outlook between societies, brokers and underwriters should only result in the development of a fair and equitable relationship.

New Zealand professions have so far evaded the spectacular million dollar claims, but the $100,000 and the $200,000 precedents have occurred. Wise practitioners, conscious of their unlimited liabilities, are taking heed of these trends and continue to improve their systems and methods and finally to insure in greater numbers to cover themselves, and their obligations to protect their clients.

And finally, may I leave you with this one thought. In this rapid changing world we should remember one of the fundamental principles of insurance, that you, the insured are bound to know more about your risk than the underwriter
or broker. If this principle is remembered together with the principle of good faith, then I believe that insurance underwriters and brokers will continue to provide the protection you need.

Thank-you, Mr Chairman.

QUESTIONS ADDRESSED TO MR DONALD

Question:

Mr Ladd: Mr Donald may be able to tell us whether the solicitor’s professional indemnity policy excludes gratuitous advice.

Reply:

Mr Donald: Perhaps I should ask Mr Vautier to define this for us. Mr Vautier did make the observation that gratuitous advice arises only when the advisor carries on the business or profession of giving advice of the kind sought.

When I was in England at the end of 1971 negotiating terms, we did discuss at some length with underwriters the problem of the Hedley Byrne case and there was a tremendous diversity of points of view in the insurance market as to whether the policy did provide this cover. First they wanted extra premium for it. Secondly, if it is not in it had to be put in.

So far as solicitors are concerned this wording was extended to include "breach of professional duty" which would include breach of professional duty which may be owed other than in contract. So I would presume the gratuitous advice would be acceptable under that part.

Once again, talking specifically to accountants and solicitors who have almost identical wording, the "binding" clause extends this cover to solicitors and accountants whether they bind a person as trusteee, attorney, liquidator or secretary.

The fees form part of the income of the firm. The observation which we made last year which did not arise from any particular case, was the possibility of asking solicitors and accountants in particular, using their talents for charitable organisations or their advice being given in this way, and then being relied upon, in unpaid voluntary work; so in fact we have arranged for that particular situation to come in. There again we did not know if it was intended in the policy. Our advice was "it is better to have it and not need it than need it and not have it."
Mr Vautier:
There is still a grey area in it. The wording is "for breach of professional duty". There are a number of cases which show that for example in the case of solicitors it is not within the scope of their duty as solicitors to give advice on business matters, but of course they constantly do that. The insurer so minded could certainly look those cases out and say it was not within the scope of the ordinary practice of a solicitor to do this and therefore although Hedley Byrne may apply, the solicitor may still have no recourse under the policy.

Question:
Mr Barnett:
Would Mr Donald give us the difference in the figures a person pays. A doctor pays $50 per person, an engineer may pay $2000?

Reply:
Mr Donald:
Per person? In the figures I did mention that the rating factor depends on the sum insured and the type of work that is being done by the various firms. I did one calculation where we had a rate on the fees earned and that was taken over somewhere about 1000 practitioners, partners in firms, and taken over a variety of sums insured as a level. I will just hark back to these other figures I gave you.
The two firms I quoted here in this particular case; 1972, one partner, two staff, paid $337 for an indemnity of $50,000. The other with four partners and 13 staff paid $836 for an indemnity of $100,000.
That is taken from the legal and accounting scale of rating. Valuers are those who seek similar indemnities generally and therefore are paying appropriately less in comparison with others. The same with Quantity Surveyors. It is a very statistical thing. I don't know whether Mr Adam has any observation there.

Mr Adam:
Impossible to answer because of the number of variants. Not only the type of business. Earlier in the piece Mr Donald mentioned in the course of action "internal diary control".

Mr Donald:
Claims out of time. Injury claims, etc. And that class of thing. You get back to the basic circumstances that somebody has not recognised you must do.
Question:
Mr Salmon:
Commented that in a private practice a partner who cannot attend to his duties, because of ill health must:—
(a) inform his client
(b) arrange for some other practitioner to take over the work.
He asked for clarification of the situation where in a commercial enterprise employees fall ill in their daily life. Is this covered by breach of contract or failure to fulfill?

Reply:
Mr Donald:
The observation we are making here is that the cause of the loss to the client or the person affected is a negligent act. The negligent acts in the cases we have mentioned have arisen during a time when the person was sick. And this would precipitate it.

Queried:
Mr Salmon:
What is negligent in going sick?

Reply:
Mr Vautier:
That is the point. Was there negligence in all of the circumstances? The circumstances must be considered and it may well be that if a man is incapacitated from attending to his affairs he cannot be classed as negligent, but of course if there is something he could have done by getting another person to attend to them then he is negligent.

Mr Donald:
It was difficult to say the particular loss was due to his sickness.

Question:
Mr Haines:
What do you see as meeting the two situations:—
(a) a widening of the requirements of society for protection
(b) the diminishing of the insurance industry to cope with it.?

Reply:
Mr Donald:
I think that is a matter which will be dealt with by the speakers this afternoon. Perhaps you would like to address this to Mr Duncan. I have noticed in our own company report that the profitability is returning to the market and the capacity is increasing right across the field and a lot is to do with people knowing where they are going and what they are doing. There is an increasing capacity generally in the market now that profitability is coming back and we have seen this in the aviation field where the airlines sought to organise their own insurance companies and found this was not really the answer. They were really doing this because of lack of capacity and the
advent of the jumbo jets but the insurance companies are doing this and in the aviation market it is as competitive as it has been for years.

Question:
Mr Ladd:
What protection is afforded the solicitor who becomes involved in Social Welfare and is required to give advice outside his particular field?

Reply:
Mr Donald:
One of the things getting back to the professional man. This is an area that is certainly receiving very close study in all professions. To make coverage sufficiently wide to cover the man in situations where he contracts in addition to his official capacity. As far as Citizens Advice Bureaux are concerned we have consulted three; one said “no”; the other two took out insurance, and we had diversity of opinion from solicitors as to what was necessary.

Question:
Mr Allen:
Asked whether the solicitor who has an insurance agency and the solicitor acting as trustee or executor in a family trust is covered.

Reply:
Mr Donald:
Generally with reference to insurance agencies. Some years ago when we first had a claim it was clarified by the group of underwriters. They would regard insurance agencies as being part of the work of the solicitor or the accounting firm and the underwriters who took over it would be blind to the fact that solicitors tend to engage in insurance work of varying degrees of interest and it was agreed that this would become part of the capacities. They have become very uneasy over the last two years and have asked for information. This is part of the changing scene. They have agreed that it is covered. As far as the executor and trustee one is concerned I believe a question was raised in Wellington where the trustee was aware that investments had been made that were not going as well as they should, mainly as a result of his power (again back in general terms) and his question is “now he is supposed to advise beneficiaries that things are not going so well and this shows he is at fault?” As far as I am concerned, he should consult the underwriters immediately and telex details away to his insurance company.

Question:
Mr Allen:
Asked what would be the insurance situation where the professional is personally involved.
Mr Donald:
Underwriters for the solicitors scheme ask the question "Are you a director or shareholder, or have any finance in a company in which you are a solicitor," and where the answer is "yes" underwriters exclude. This does not include solicitor's nominee companies. But they do not actually ask the question of accountants. They ask it of solicitors.

Mr Coleman:
Asked whether in the future the professions in N.Z. might be able to act as virtually their own underwriters and so avoid the necessity of sending vast sums of money out of the country.

Mr Donald:
I tried to make the point in this discussion here that the last ten years in particular have been very much a learning stage both with the professions and the things which are developing and the results which insurers have had, have hardly really shown that they are making a fortune. If they really extracted the figures as they wanted to and not as I wanted to, they could prove hefty losses. We cannot see the results in any one year except 1966. It is this run off of claims and lack of knowledge in liability insurance that causes problems.
If you take part in a world wide pool there is a chance that there is a capacity for the whole market to absorb a skyrocketing claim. Whether we could do this in N.Z. without the volume of premium I do not know.
If for example solicitors and accountants were paying $500,000 it is possible we could well see that extinguished in a series of $80,000 claims some of which are not estimated as $80,000. They are put down as "no estimate" because the underwriter does not know. There is a case where for 3 years it was a claim with nothing against it and now it is fixed alive at $20,000. I feel there is a history of experience that underwriters can offer and also a capacity to absorb any large claims.
We are able to share some of the primary losses and it is going to come down really to the risk control that is brought into it and also the definition of N.Z. experience. The series of claims we know of and other brokers have got is producing information that will give a history and give us something to work on. If there is an easier area to define liability the insurance market is to be used to take out the humps and hollows.
Question:
Mr Morgan:
   Asked:-
   (a) Is this the least profitable insurance underwriters are asked to accept?
   (b) What is a reasonable profit underwriters would expect from Professional Liability Insurance?
   (c) Are there statistics to show a captive market of professional men?
   (d) Do increased premiums show a marked drop in the number of policies being taken out or renewed?

Reply:
Mr Donald:
After the major changes certainly there was a reduction in the number of firms that insured but, equally, there was virtually a revitalised interest in it and we found that while a number of firms were prepared to carry their own risk (at least for about a year) a number of new people came in and some of the old ones are coming back. That is the result of the premium. Buyer resistance is very strong but faced with facts which I hope we will be able to give here, a more realistic appreciation of the problem is existing.
As far as the profitability of insurance companies is concerned I do not think they know how much they expect or hope to make out of it. Certainly they normally seek to cover their expenses. They also like to build some reserves and, hopefully, pay their shareholders.
Going back to the cost of the business. Normally speaking underwriters have taken somewhere round 30% as the cost of servicing the business. And then, of course, they seek to have some reserves which they try to take out. So that I think ... I am trying to cast my mind back briefly ... one underwriter said if he could make 10% out of it he would be very happy, but he has yet to see it. Most have not been at it long enough to see a true 10% profit in any one year.
I cannot answer part 1. It is certainly highly susceptible to regard as being not profitable, but we do not really know what the final result is.

Question:
Mr Thomas:
   Asked whether for the maximum cover the one man practice would receive a reduction in premium.

Reply:
Mr Donald:
I would just like to say that in general the underwriters are measuring the risk on all occasions anyway. It may be that they would provide some facility for insuring part of A as well as B and C.
The public are going to be protected in the whole circle and the professional man could perhaps reduce his proportion and the standard of his own practice could be measured on the premium the underwriters would require.
THIRD SESSION
INTRODUCTION TO 3rd SESSION.

by Dr Northey

The third paper is being given by Mr Bob Duncan who can take a large share of the credit for this Symposium being held. Mr Casey knew of the research that Mr Duncan had put into this subject and the Seminar was in a sense built around Mr Duncan’s paper.

On the platform are two commentators, Mr Becas and Mr Menzies. We had also intended to have with us the Attorney-General, but he is engaged on a more important matter at the International Court.

I now introduce to you Mr Bob Duncan and invite him to present his paper.
PROFESSIONAL RESPONSIBILITY

by R.H. Duncan Esq., LLB.

I have become increasingly aware over the last few years of the fear held by medical practitioners, particularly in the United States of America, of ruinous damages claims which follow with increasing frequency from a genuine endeavour to give needed medical assistance, and the trend on the part of doctors to avoid giving that assistance for fear of such claims. I have, as well, noticed a marked difference in the attitudes of accountancy and engineering practitioners in their dealings with their clients during the same recent period. No longer are instructions accepted in the fashion which has always prevailed but recently confirming letters are being sent by practitioners to clients containing conditions of acceptance of appointment, and reports are being received bearing statements of limitation and disclaimers of responsibility. The reasons for these changes will be apparent from the discussions of the papers here this morning and are more especially highlighted by the following comments made by a professional person recently when discussing the terms of his firms indemnity insurance.

"In 1970/71 our premium was $1,137.00 for $200,000.00 cover. This year for a $200,000.00 cover the premium is $29,292.00... previously our insurance did not contain any deductible sum; with the present system we pay the first $12,000.00 of any one claim. Previously our cover was for each and every claim. Now our cover is for the total of all claims."

It may be thought that the concern being shared by the professions in respect of claims for negligence arising from a contractual or from a tortious base has arisen from the contingency basis on which lawyers in the United States of America are permitted to work. The conduct of an action with almost as great a regard for the lawyer’s personal interest as for the interest of the client may well result in actions being taken against professional people for alleged negligence at the behest of the lawyer who will share in the result, rather than because of the direct desire of the client. In such an event it may have been thought that the concern of the professions would be greater in the United States than elsewhere but this has not been shown to be the case as the insurance industry does not appear to rate the United States as a higher risk area than other places in the English speaking world. The magnitude of claims and the increasing willingness to make a claim has created a problem of such significance that in the last five years professional bodies throughout the world have devoted a great deal of time to a comprehensive enquiry into the question of professional responsibility leading to many invitations to learned commentators speaking at professional gatherings to review and discuss the topic in great detail. From such discussions and commentaries professional bodies throughout the world have at national level prepared submissions to their Governments seeking authority to limit liability in one form or another. Submissions have been made by the accountancy profession to the Scottish Law Commission and to the Australian Attorney General and the New Zealand Society of Accountants has made submissions to the Attorney General in New Zealand, while the International
Federation of Consulting Engineers, with its headquarters in Switzerland, published a year ago the findings of a working Committee on Professional Liability entitled “A Guideline for Consulting Engineers on Professional Liability” and I am aware of urgent attention being given by consulting engineers in this country to representations to members along the lines recommended in that publication. The grave concern being expressed by these bodies is growing more urgent as the public and the professions engage in more sophisticated pursuits and as the public becomes more widely informed as to possible liability, while the risk to the professional person is being heightened by a trend in judgments throughout the world towards the principle of absolute liability.

I begin with an enquiry into the definition of professional responsibility and some brief assessment of the measure of it. You have heard this morning from Mr Vautier a detailed discussion of the legal principles and cases which bear on this topic but I restate in the words of Lord Upjohn that:—

“The attributes of a profession have been enumerated as a high standard of skill and knowledge, a confidential relationship with clients, public reliance on the standards of its practitioners and the observance of an ethical code.”

And Dean Pound has described a profession as:—

“A group of men pursuing a learned art as a common calling in the spirit of public service.”

From such definitions of a profession which recognise that a high standard of skill and knowledge is required where there is public reliance on that skill and knowledge the common law imputes a contractual duty to exercise that special skill. In addition the professional person is under a general duty in tort to exercise a proper degree of skill and care wherever failure or omission is likely to cause physical injury to persons or property. Such duties therefore apply in the case of a group of men pursuing a learned art as a common calling in the spirit of public service. No less a public service because incidentally it may be a means of livelihood. In most walks of life, in business and in trade earning a livelihood is the primary purpose. In a profession earning of a livelihood is not necessarily the primary purpose, for if public service is not a primary purpose of a calling then it is not a profession. The extent of the duty of care imposed by the common law is honestly and diligently to use that care and skill which would be used at that time by other competent persons in the same profession. Where this is a contractual duty there is a direct relationship with the client. And where the duty lies in tort it is owed to all persons to whom injury could reasonably be foreseen whether they are or are not in any contractual relationship with the professional person.

As the pace of life has quickened and become more complex, so have clients become more sophisticated in their search for a mistake on the part of professional advisers if things go wrong and the law has adapted its ancient rules to modern circumstances in order to support them if their claims are well founded. Traditionally errors or omissions have been the basis for claims. But the professions have now become aware of a new trend in the law of many countries, i.e.: the preoccupation with finding a way of giving redress in the absence of fault. Since the 1950’s the doctrine of implied warranty has prevailed
in United States judgments to the stage that it is becoming common in many
claims being formulated against members of professions in sympathy with the
general psychological climate of society presently being called "consumerism."
This sophistication in searching for a remedy and the movement toward a strict
liability environment is the cause of rising concern of professional bodies which
is to be noted in professional representations and in remarks of learned
commentators. Mr G.P. Hanna who is legal advisor to many involved in the
indemnity field to the Society of Accountants in Auckland in 1970 said:—
"Your profession is so vital to our society that nothing must be done that
might weaken its efficiency, but even so instances such as the Continental
Vending and the Pacific Acceptance Corporation cases have shown that to
sustain that efficiency there must be a limit upon the extent to which
members of an accounting firm are expected to expose themselves to
ruinous claims for damages. The money consequences of a mistake by a
practising Accountant can today be such that he risks bankruptcy in the
case of any large claim which can easily be above the limits of his
insurance."

A further example is that of Robert Trueblood, a past President of the
American Institute of Public Accountants, who in 1968 said:—
"I think that the liability question ties in with some of the profound
changes taking place in society. In the conditions that are now forming the
traditional unlimited personal liability of Chartered Public Accountants in
public practice is manifestly inequitable."

In a letter written to the Attorney General for the Commonwealth of
Australia in 1969 the President of the Institute of Chartered Accountants in the
country expressed his Institute’s grave concern at the openended financial
liability with which every one of its members in public practice is increasingly
faced. That letter noted that the smallest degree of failure on the part of an
auditor or of a member of his staff can have consequences out of all proportion
to the degree of fault involved. This has the result that premiums for
professional indemnity insurance are extremely high, and has the further
consequence that it becomes impossible to make an accurate assessment as to
the amount of insurance cover a practitioner should seek. The possibility of
financial ruin haunting a practitioner throughout his professional life may well
act as a disincentive to an Accountant of the highest ability to involve himself in
public practice as a principal as opposed to following an alternative career as for
example an executive in industry where his personal assets are not at risk. Mr
G.W. Beck, Senior Lecturer in Accountancy at the University of Queensland, has
commented:—
"There is no doubt that the stimulus for Australian Public Accountants to
consider the possibility for incorporation has come from the changing
social and economic environment resulting in an apparent increase in
exposure to negligence suits. Insurers have provided ample evidence that
they too see increased risk in that indemnity insurance premiums have
risen rapidly over the last decade."

The Council of the Institute of Chartered Accountants of Scotland has
instanced cases that can arise where the liability of Accountants in the event of
professional responsibility may be out of all proportion to the responsibility
assumed, and in extreme cases can cripple the firms of practising Accountants concerned. In its 1972 publication “A Guideline for Consulting Engineers” the International Federation of Consulting Engineers commented:—

“In those countries where the common law is based on a respect for decisions by the highest judicial court in that country there has been a tendency to hold the professional person responsible for general acts of negligence, and this has made insurance by Consulting Engineers for professional liability increasingly difficult to obtain on reasonable terms. There is an increasing awareness on the part of Attorneys of the fact that Engineers and other professionals are vulnerable to professional liability suits coupled with a tendency in the Courts in the United States to give large awards in liability suits particularly where innocent parties are involved.”

And there is this further comment in the same publication:—

“There is also an overlap which seriously compounds the insurance problem. For example because of the increasing sophistication of engineering and construction many more engineers, contractors, sub-contractors and other parties may be involved in a project. The insurers for each of these parties are writing more restrictive policies and are becoming more difficult to deal with.”

Against these examples of the increased vulnerability of professional persons to shoulder responsibility infinitely greater in amount and over a much wider area of responsibility than ever before, I turn to a consideration of those alternatives open to the professions to protect their members from the fear of personal bankruptcy of themselves and their partners. First, there is common to all professions a continued striving by professional associations to improve the standards of practice of members. Each professional body fosters and maintains increasingly high standards for admission to membership and most require a minimum experience requirement before a member can engage in public practice. Strict disciplinary controls are generally maintained and a comprehensive programme of continuing education is being encouraged by most professional bodies at national level to improve and update professional knowledge and to encourage members to attain and maintain high standards of expertise. Precision in setting the terms of engagement is being actively encouraged both in accountancy and engineering. For example, in a report entitled “Professional Liability” published by the New Zealand Society of Accountants and distributed to its members in August 1972 great emphasis is placed on the importance of confirmation in writing of the terms of engagement so that a practitioner cannot be held responsible for failing to do something which he did not agree to perform. Reference is made in that publication to a paper presented by Mr Gordon Samuels, Q.C. at the Congress of the Chartered Institute of Accountants held in Canberra in June 1971 when he said:—

“There is one way of restricting liability which does not contemplate any breach of duty. That is by being careful to ensure that the terms of engagement and the scope of the work to be done are set out in writing. This can certainly be done in the case of an agreement to provide accounting services. It is not a means of excluding liability for negligence but it does serve to prevent the accountant from later being assailed for failing to do what he never undertook or intended to perform.”

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In the “Guideline” published by the International Federation of Consulting Engineers there is a recommendation which reads:—

“It appears desirable to attempt to limit risks by appropriate wording of contracts.”

I am unaware of any move in this direction in other professions and indeed I see some difficulty of precise definition of the task to be performed in the case of some of the professions. But wherever there is a claims experience manifesting itself, professional bodies are encouraging publication to members of the circumstances surrounding such claims and the results of them. One of the large insurance brokers in New Zealand when negotiating professional indemnity insurances, has made a habit over the last year or two of pointing out to members of the various professions matters arising within its claims experience and suggesting to practitioners those areas in their work that may be especially likely to involve the risk of a claim.

The second heading I wish to discuss is that of limiting professional responsibility by contract or disclaimer. Mr G.W. Beck, in an article in the Australian Accountant of October 1970 said:—

“The logical course when exposed to dangerous situations is to minimise the area of exposure.”

And in a report on Professional Incorporation and Professional Liability prepared by the Institute of Chartered Accountants of Ontario in December 1970, I note this statement:—

“The most obvious protection available to members is to ensure that every client understands and agrees to the limitations inherent in the service which he expects the Public Accountant to perform. This can be done by writing a letter to the client.”

In other words, limiting possible liability by disclaimer. In Gordon Samuels’ advice to the Accountants of Australia, he considered the question of excluding liability in cases where the engagement was contractual when he said:—

“It must sufficiently appear that the exemption clause is part of the contract in which it should therefore appear and it must be in clear and unambiguous terms. If these criteria are observed a clause could be drawn which would be effective to exclude liability for any breach of a contract to provide accountancy services. For example something along these lines:—

‘X and associates shall not be liable to A company Limited in damages or otherwise for any negligence or breach of contract or duty whatever and howsoever caused or arising by them, their servants or agents in or arising out of or in any way connected with the performance of this contract.‘

Whether any firm of accountants would be prepared to employ a clause of this sort is of course another matter, but in law they could. There are limitations upon the effect of this as an exclusion clause. First, no such stipulation will be effective to exclude liability for a substantial failure to perform the contract at all. Secondly, it will not normally serve to protect the accountant’s employees from the consequences of their own negligence, because they are not parties to the contract.”

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And Mr Samuels went on to say:—

"Liability under the rule in *Hedley-Byrne* is tortious and not contractual. There exists at the outset a nice legal point as to the way in which this liability arises which profoundly affects the question whether and to what extent, the consequences of a negligent misstatement can be avoided. I think it is sufficient for present purposes, however, to express the view that liability under *Hedley-Byrne* may be excluded by a disclaimer which clearly indicates that the statement, advice, or information is made or given without responsibility for its accuracy, provided that the disclaimer is received by the recipient of the statement, advice or information before he acts upon it. I think that a sufficient disclaimer would be to the following effect:

'This advice (or as the case may be) is furnished for the information and the use of the X Company only. We do not undertake to the X Company or any other party any responsibility for its accuracy. We expressly disclaim to the X Company or any other party any responsibility for any misstatement error inaccuracy or omission which may appear in it whether as a result of negligence on the part of ourselves or our employees or agents or any other person or otherwise howsoever.'

It follows from what I have already said about *Hedley-Byrne* that no liability is likely to arise anyway to persons not in the reasonable contemplation of the adviser, or in respect of a purpose or transaction for which he had no reason to suppose his information or advice was to be used. To this extent, the form of disclaimer suggested above is perhaps wider than strictly necessary, but I still favour the extended terms. The disclaimer should be in writing and should appear prominently on the face of the document in question. As a counsel of perfection, it should be acknowledged by the recipient.

In the conclusions reached by the International Federation of Consulting Engineers working Committee on Professional Liability of April 1972 there is this statement:—

"It appears desirable to attempt to limit risks by appropriate wording of contracts and to develop a clear set of rules governing the relationship between a consulting engineer and his client."

And in the case of our own New Zealand Institution of Engineers I am aware of recommendations of a Task Committee which include the following statement:—

"The recommended clauses for inclusion in the N.Z.I.E. Conditions of Engagement limiting the liability of the Consulting Engineer to the client are:—

**Limitation of Liability**

The maximum aggregate amount for which the Consulting Engineer shall be liable to the client in respect of any claim or claims arising out of the engagement of the Consulting Engineer and the services performed or to be performed by the Consulting Engineer pursuant to or arising out of such engagement shall be the sum of $X. Such limitation shall apply to every claim whether it arises from contract or tort or otherwise."
Indemnity Insurances
At the express request of the client at the cost of the client in all respects
the Consulting Engineer will endeavour to obtain a professional indemnity
insurance cover for a sum in excess of $X to be nominated by the client in
writing at the time these Conditions of Engagement are accepted by the
client and in respect of the work which is the subject matter of the
Consulting Engineer’s engagement.”
And the Council of the Chartered Accountants of England and Wales
conclusions in a statement issued to members last year were as follows:
“Although it is not possible to guard against every circumstance in which
an accountant or auditor may run the danger of incurring liability for
professional responsibility, the following matters should be borne in mind:

(a) Before carrying out any work for a client, a member should ensure
that the exact duties to be performed, and in particular any matters to
be excluded, have been agreed with the client in writing by a letter of
engagement or otherwise. If the accountant is asked to perform any
additional duties at a later date, these should also be defined in
writing.

(b) In giving “snap” advice at the request of a client, a member should
make it clear that such advice is subject to limitations and that
consideration in depth may lead him to revise advice given as a matter
of urgency.

(c) When submitting unaudited accounts or other unaudited financial
statements or reports to the client or other persons, a member should
ensure that, in appropriate cases, a clause disclaiming liability to any
person other than the recipient is included on the face of the accounts
or financial statement.

(d) When giving references to a third party with regard to future
transactions (for example, payment of rent) a member should state
that his opinion is given without financial responsibility on his part.

(e) Where the circumstances appear to warrant it because of their
complexity or otherwise, a member should advise his client that he
considers it desirable to take specialist advice. In certain circumstances
it may be appropriate for a member either to consult another
accountant or to suggest to his client that the advice of a member of
other professions should be sought.

(f) It should be recognised that there are areas of professional work (for
example when acting as auditor under the Companies Acts or as
receiver or liquidator) where it is not possible for liability to be
limited or excluded. Where a member acts as receiver he should also
ensure that the person appointing him executes an appropriate letter
of indemnity in his favour. A member should also arrange for
professional indemnity insurance cover of a realistic amount and
should ascertain from his brokers whether or not cover is provided for
the special risks involved.”

Thirdly I am aware that over the last few years there has been a growing
search for some more precise and absolute limitation of professional respons-
ibility. This has given rise to a deep enquiry as to the prospect of permitting the
use of a corporate structure with limited liability as a means of isolating personal assets from liability for claims against one’s professional practice. In Australia in December 1969 the President of the Chartered Accountants Institute sent a submission to the Federal Attorney General suggesting that an enquiry be instituted to allow limited companies to engage in public practice as professional accountants in Australia and Mr J.R.M. Wilson in reporting on the work of a special Committee on Professional Incorporation in December 1970 in Ontario Canada stated that:

“Recent developments particularly those initiated by the American Institute of Certified Public Accountants and the Institute of Chartered Accountants of British Columbia have brought the subject of incorporation to the attention of members and many have concluded that it would be desirable to carry on practice in corporate form with a view to providing some financial protection to the practitioners in the event of serious damage suits. It has been made clear that a professional man cannot achieve protection against his personal negligence merely because he carries on his practice through a limited company. However the personal estates of other employees or officers of the company would no longer be in jeopardy as they might be if practice were carried on by them in partnership form.”

The conclusion that this form of limitation may be valuable was referred to by Mr G.P. Hanna in his paper called “Professional Responsibility” of 21st August 1970, and in submissions by the Institute of Chartered Accountants of Scotland to the Law Commission in June 1972. The first alternative considered was to allow limited companies to engage in public practice as professional accountants. In New Zealand the Society of Accountants in its report on professional liability of August 1972 included, as one of the alternatives posed to members, that of professional incorporation. Mr Samuels’ commentary of July 1972 states that incorporation has many advantages.

“It would protect individual partners but if the accounting company is to keep faith with its clients it must still maintain a fund sufficient to satisfy any successful claim against it. If each partner brings in a specified sum the balance to meet contingent liability of unspecified extent must be provided. This would require continued reliance upon indemnity insurance. But we have already considered the problems of the insurance industry in regard to this type of indemnity cover.”

With regard to the difficulties likely to be experienced following incorporation of practices, the Scottish Institute of Chartered Accountants notes that problems would undoubtedly arise in connection with the disciplinary position and with matters such as subscriptions and the right to take apprentices, articled clerks and registered students. And Mr J.R.M. Wilson comments that:

“It should be made clear that a professional man cannot achieve protection against his personal negligence merely because he carries on his practice through a limited company. He would still be responsible up to the entire amount of his assets for his personal professional negligence and the company whose servant or agent he would be would also be vicariously liable for his professional negligence up to the extent of its net assets which might involve the bankruptcy of the company.”
Thus the conclusions based on Mr Wilson’s report include these words:—

“With the changing attitudes of the public, we see no reason why the Institute should object to its members carrying on practice in corporate form if it is to their advantage to do so, provided that the Legislature of the Province of Ontario will give them this right by amending the Public Accountancy Act and the members of the Institute will pass the necessary amendments to the Rules of Professional Conduct to ensure that the corporate form does not make more difficult the relationship between the Institute and its members or is contrary to the Public Interest.”

But note the comment of Mr G.W. Beck of October 1970 in his paper “Incorporation of Public Accounting Practices” when he remarks:—

“It is difficult to see how incorporation will provide protection except in very exceptional circumstances and, at best, this protection must be partial. Incorporated or unincorporated, the public accountant has to face up to a more critical social environment with a tendency, already evident in the U.S., for people to seek remedies in the courts when they believe they have suffered damage due to the action (or inaction) of a professional accountant.”

And so I turn to the fourth suggestion which is seen to be emerging to deal with this vexed problem. That is statutory limitation of liability.

In December 1969 the President of the Chartered Accountants Institute of Australia in his submissions to the Australian Attorney General expressed the Institute’s grave concern at the opened financial liability with which every one of its members in public practice is increasingly faced and requested that consideration be given to some form of statutory limitation of that liability. The submission sought legislation limiting the area of responsibility and the amount of damage for which a practising Accountant could be held liable. Mr G.W. Beck’s comment published in October 1970 said:—

“The professional bodies would be wise to seek statutory limitation of damages for negligence and relate the damages to what the practitioner has at risk.”

Mr J.R.M. Wilson noted in December 1970 that a more desirable form of protection than incorporation would appear to be the obtaining of a statutory protection specifying the time in which a claim must be filed and the amount which may be awarded in damages; and a submission by the New Zealand Society of Accountants to the Attorney General this year says:—

“We believe that in the public interest there should be a statutory limitation on the liability attaching to the Chartered Accountant in public practice.”

This submission included as an example details of statutory liability which prevails in West Germany for professional persons. In the Australian submissions to their Attorney General mention is made of the degree of financial responsibility which Accountants in public practice are expected to assume as increasing beyond all fair and reasonable bounds.

“The contingent liability which the law and the community requires them to accept has reached quite unrealistic proportions.”

A Chairman of the New Zealand Institute of Engineers has stated in a
report to his Institute:

"The alternative which has been suggested on many occasions and which I am absolutely certain is the ultimate answer is to have a professional man's responsibility defined by legislation."

Gordon Samuels at the end of his article says:—

"The only adequate solution is statutory limitation of liability. It exists already in West Germany. And there is, in its favour, a most arguable case. The audit area is the field in which this kind of relief is most needed, because of the high risk of error involved, and its potentially huge financial consequences. It is also the field in which relief is most merited, because the auditor's tasks are imposed by statute; so that, for all practical purposes, the accountant, in one aspect of his practice, is compelled to undertake a specified class of work of an hazardous kind.

The solution to the problem of statutory limitation of liability should depend upon an assessment and balancing of the competing interests involved. On the one hand, the public has an interest in ensuring adequate and skilful supervision of the conduct of public companies. This involves not only the maintenance of the audit system, but the maintenance of a race of properly trained, competent and independent auditors. But, in addition, there is a very real interest in the recovery of adequate compensation from the source of the error which causes loss.

On the other hand, the profession has an interest in protecting itself against the risk of crippling verdicts, which, because of the unlimited liability of partners, may involve individual practitioners in financial disaster. Moreover, those wholly innocent of fault may suffer equally with the guilty, and in many cases it may be thought that the extent of the verdict is altogether out of proportion to the degree of fault involved. Ultimately, the question must be whether the public interest requires some limitation of liability. This is a problem of great complexity. It may be that I have framed the question too stringently. Perhaps the issue ought to be whether statutory limitation is consistent with the public interest. Arguably it is, and is supported by a socio-legal approach of some cogency. It may be said that corporate business activities, with all the necessary concomitants of supervision by audit and otherwise are a necessary and inherent part of a modern commercial community. From their existence all members of the community, with some exceptions, derive benefit. They are at least inseparable from the development of any free enterprise society. It is inevitable that from time to time their activities will cause loss, because it must be anticipated that the system of control and supervision, either internal or external, will sometime break down, permitting damage to be inflicted by reason of fraud or irregularity. When a fraud causes loss, because the auditor negligently fails to detect it, he is what may be called (inaccurately but sufficiently for present purposes), a principal in the second degree. He is not the author of fraud. He has failed to make good an obligation which he has no option but to shoulder, because I imagine that an accountant who refuses to audit may well be at some practical competitive disadvantage. Both the auditor and the villain are responsible for the loss, and the villain, in the pinch, is probably not worth powder and shot.
While it is right to require the auditor to contribute to the loss, it may well be considered too onerous to expect him to bear the whole of it. Why should not part of the loss be absorbed by the community generally as the price which society has to pay for permitting a necessary and desirable, but always potentially dangerous, activity?

If there is a total limit of liability (part provided by the auditing firm or company, and part by insurance) and the damage exceeds the limit, it is, of course, the victims of the auditor’s breach of duty who bear the loss (unless the State makes up the difference). But why should they not, as members of the investing public (as presumably they would generally be) bear part of the risk, especially where corporate activities (of which they seek the benefit) are becoming so complex as to place increasing burdens upon those who are required to supervise them.

I do not pretend that the problem is at all easy of solution, or that the argument I suggest will be readily accepted. And I do not think that it can apply in the case of accountancy services (other than audit) where means of excluding liability presently exist, and where no comparable case for protection can be made. But, as I have said, there is an arguable case for statutory limitation of liability of some kind; and it is towards this, rather than the minor palliative of incorporation that the profession should aim."

My own conclusions are that:—

— If education in the professions continues to advance and proper care is urged upon members at every opportunity.

— If limitation of responsibility by contract or disclaimer seems inadequate and if incorporation appears unwieldy and ineffectual then clearly all professional views must favour statutory limitation.

From the point of view of those who indemnify professional people, whether they be professional co-operatives or the insurance industry, an upper limit on the contingent responsibility assumed will make for accuracy in assessing premia and a more willing acceptance of the concept of spreading the risk. From the public point of view and the point of view of the client concerned, it will be necessary to establish a limit which is sufficient to secure the most strenuous efforts available on the part of members of the professions, a genuine endeavour to meet all responsibilities for the sake of the reputation of the practitioner and his practice, but none-the-less a realistic level which avoids the undesirable possibilities of people failing even to take up practice or adopting fees structures which recognise and take into account expensive and excessive premia for unlimited responsibility.

It is unrealistic to provide a client with an unlimited indemnity which may never be met but which may well involve bankruptcy of a highly skilled professional person of undoubted integrity and, worse still, his professional partners. Common justice to these people surely justifies limitation by statute.

Recognition of this principle has prevailed for generations in commercial circles. The Limited Liability Act of 1855 permitted an isolation of personal from business assets in commercial transactions and this facility is available today to every contractor. Whoever hears of any major construction contract being undertaken by an unincorporated contractor yet his professional advisers are required to guarantee their advice with every cent they and their partners possess.
Limitation of liability exists by statute in the case of hotel keepers and carriers by land, sea and air, and is doubtless justified on the basis that the public may arrange its own insurance cover at its own cost whenever there is thought to be a risk beyond the limitation sum that applies. It may be suggested that this is in return for acceptance of absolute liability. But has it not been shown that there is a trend towards this principle evident in professional responsibility claims today?

My case in support of a recommendation that the Legal Research Foundation endorse the submission of the New Zealand Society of Accountants to the Attorney General soliciting statutory limitation of liability is based on the following factors:

First, there is ample precedent for statutory limitation of liability, particularly when risk which is otherwise difficult to determine is involved. In the case of professional responsibility, I do not advocate removal of liability but rather limitation in an amount which is realistic both to the professions and to the public they serve.

Secondly, as the trend towards a strict liability environment continues, the quid pro quo of limitation seems to me appropriate and fair.

Thirdly, in no other sphere than the professions are persons or corporations expected to commit the total assets of themselves and their partners to a guarantee of the task to be performed. Performance bonds sought by Government agencies in respect of vast commercial contracts are never expected to provide a one hundred per cent indemnity.

Fourthly, it is manifestly unfair that professional persons who are self employed together with each and every one of their partners should face financial responsibility vastly in excess of the greatest value placed by the courts on human life or human capacity in personal accident compensation claims.

I believe that the time has come when the client will respect that a proper sanction is as much as can be expected to guarantee the absolute integrity of professional work; when the insurance industry should be permitted to assess risk with certainty by closing the open end of professional responsibility, and when the social conscience is ready to recognise the spirit of public service inherent in every profession and cease to expect a double indemnity in the form of unlimited financial responsibility as well.
COMMENTARY

by Mr Beca

Gentlemen,

Introduction

Over the last decade or so much as been written on this subject. All professionals in the Western World are concerned with the present climate in which they practice. There has been and still is much confusion and incorrect statements and impressions on the subject. I believe it would be an indictment of the professions if we could not together rationalise and determine a solution to the problem—a solution acceptable to the public and the professions alike. The speakers have given you a very good background to the issues involved. This symposium could not hope to solve all the problems but it could prove the launching pad from which changes are made.

The subject is complex and affects each profession to varying degrees although I believe the basic problem is common to all the professions. One cannot do more at a symposium such as this than discuss the principles involved and indicate a possible course of action (I hope I am not being too presumptuous in suggesting that some changes are necessary). Details must inevitably be left to some select committee to investigate and the information and conclusions passed on to the interested professions.

What are the important issues involved in Professional Responsibility? The speakers have ably mentioned most of them. However, I would like to briefly mention the issues as I see them—I trust you will forgive the natural bias my comments have towards engineering—but as I have already stated, I believe the issues are common to all the professions.

The main issues as I see them can be classified under the following headings:

1. Changes are taking place and are inevitable,
2. The Public must be adequately protected,
3. It is unreasonable and illusionary for the professional to have unlimited liability,
4. Corporate practice is not a solution to the problem,
5. Professional standards must be maintained,
6. The solution is in our own hands,

I will briefly discuss each one of these issues.

1. **Changes are taking place and are inevitable**
   
   I think we must all agree that this is a fact. We wouldn't be here if there wasn't a general feeling that present conditions are unsatisfactory. What are the main reasons for this feeling?
   
   (i) There is an increase in public demand for professional services and a greater involvement of all the professions in an increasingly complex variety of business activities.
(ii) Professional standards are continually rising.

(iii) There has been a failure of existing professional standards (including methods of organisation and administration) to meet the standard of performance and duty of care reasonably expected from specially trained skilled persons offering their services.

(iv) There has been an enlargement of the class of persons to whom duty of care is owed — the Hedley Byrne principle.

(v) There is an increasing need for professional people to rely on qualified and unqualified employees.

(vi) There is a greater public awareness of their legal rights and a growth in the philosophy of absolute liability.

Let me quote you this comment in a recent issue of the American Society of Civil Engineers Journal:-

"So much for the past. Where does the industry stand now? Consumerism, a word so new that it can’t be found in recent dictionaries, has become the commonest of household words. This period in our economic history has aptly been characterized as the age of consumerism. This characterization seems highly appropriate because never before have the interests of consumers received so much pre-eminence. At all levels of government, and in the private sector as well, the voice of the consumer is heard loud and clear. That voice is heard loudest in the halls of Congress. During the past 6 years, Congress passed more consumer legislation than in any other period of history in the nation. The old law of the marketplace, caveat emptor, or let the buyer beware, saw its demise during the 1960's. Today, the cry of the marketplace is caveat vendor, which could be interpreted to mean let the engineer beware. The movement to protect the consumer against fraud and deceptive practices was not born in this decade, but actually to some extent, has been with us since the creation of the Federal Trade Commission in 1914. But, the federal government has, in recent years increased its efforts to the point that there are now over 938 consumer programmes being administered by 413 federal agencies. The recent great emphasis began with a public concern for product safety and is rapidly growing to include warranties, guarantees, environmental pollution and truth in advertising, packaging and lending. It is literally reaching every industry. No one needs to be told that alleged design and engineering defects have become fruitful sources of litigation. Until fairly recently, courts have been reluctant to impose liability on a design professional. This, painfully, is no longer true. Consumerism has imposed new obligations on the engineer. He is expected to keep fully abreast of the latest technology. More and more, the engineer is held to the degree of knowledge and skill of an absolute expert. More complacency with the state-of-the-art may not, in and of itself, be sufficient to avoid liability. The fact that a certain procedure is the prevailing custom and practice in a certain area may not be an adequate defense. Both the frequency and severity of lawsuits against engineers are increasing. Legal theories are presented such as breach of implied warranty, suitability for the purpose intended, and strict liability. Add to this the inflationary spiral, especially in the construction industry, tight
money, and increased liberality of the courts, and you have some of the reasons for the increase in professional liability insurance premiums.' Gentlemen, this comment equally applies to all western countries. Therefore we must conclude that "changes are taking place and are inevitable".

2. **The Public must be adequately protected.**

   We are here to serve the public and this must be foremost in our consideration of this subject.

   The service we have to offer must not be in any way less efficient and in fact to avoid any loss in confidence the public should be able to see that he is better off if changes are made. Exclusions clauses disclaiming responsibility would not be tolerated by the public — you can’t expect the public to pay you for a service and then turn around and say to them but we don’t accept responsibility for our actions. Such clauses are obviously impracticable — but, of course, in today's climate, we must state in clear and unambiguous terms the extent of the services offered, so that the professional is protected from claims for lack of service which was never intended in his original brief. Without going into details I am sure you would all agree that the Public must not be at a disadvantage from any changes made. I hope to demonstrate later that this criteria can readily be satisfied.

3. **It is unreasonable and illusionary for the professional to have unlimited liability.**

   The implications of unlimited liability must be fully appreciated. I believe the following simple examples explain the issues involved. First I should explain that we in the Engineering profession have concluded that the professional’s responsibility should be limited by legislation and that the profession itself accepts the responsibility to see that the public is fully protected up to this statutory limit. Let us assume that this figure is set at $4 million dollars.

   Now let us take the case where the client commissions the engineer for a project where the value at risk is something less than the $4 million figure chosen. This example would I suggest, cover 80% of the commissions. If practicing with unlimited liability; what is the client’s position? He isn’t sure. He doesn’t know if the professional has any Professional Indemnity insurance or the extent of it. He doesn’t know the value of the professional's assets. He may be satisfied if he suffers a loss but he may not. Under statutory limitation and with the profession accepting responsibility for this loss the client is secure. If you were the client, which would you prefer?

   Now let us consider those cases where the value at risk exceeds the statutory figure of $4 million. Say 10 — 20% of the cases. If practicing under unlimited liability what is the clients position? Again he isn’t sure. Again he doesn’t know if the professional has any Professional Indemnity insurance and he is unlikely to have insurance for a figure greater than a $4 million. The professional is not likely to be worth more than $4 million. If you were the client would you be happy? Further, by telling him your liability is unlimited aren’t you possibly giving him a false impression of security? Isn’t this
illusionary situation dangerous to the client? Now let us consider the client’s position under statutory limitation. The client knows the value at risk is greater than the sum the profession covers him for. He can assess the situation and for the greater proportion of these cases we will consider ¼ million is sufficient for his purposes because the risk is small and where the risk is larger or in the cases where the client wants to be completely secure he pays for further insurance. Isn’t he more secure under this system? Do you think the bankrupt client will feel he has been adequately compensated because he has also sent the professional bankrupt? I doubt it.

Also it should be noted that in the majority of major catastrophes the disaster is not likely to be a simple case of professional negligence — it is more likely to be a complex situation involving a breakdown in communications, the result a drive for economy in a complex technical design and such like. The result is a lengthy costly litigation with a strong possibility of divided responsibility.

Therefore, surely we must conclude that it is not only unreasonable on the professional to practice under unlimited liability, but the client is in all probability worse off — certainly his situation is uncertain; perhaps dangerous.

4. **Limited Liability Companies**

I mention this as one of the main issues because of the common misunderstanding or belief that by the use of a corporate structure with limited liability our problems would be solved — this is not so.

As Mr Duncan has pointed out to you, a limited liability company does not protect the professionally negligent. Corporate practice is permitted in Canada, Australia and New Zealand for professional engineers and architects. The same applies in many of the States in America and it is expected that the same will apply in the United Kingdom within about 12 months. Accountants and lawyers are aiming at this in Australia. In the interests of the public and the professions these companies must be completely controlled by the professional bodies.

The main points pertaining to limited liability companies are:

(i) They are not in themselves a solution to the problem,

(ii) They are invaluable in promoting administrative efficiency in the larger practices and

(iii) They protect the innocent, who rightly should be protected. Why should the innocent place his private assets at risk? His business assets are of course at risk.

Company structure has its place in the interests of efficiency and to protect the innocent — it does nothing more.

5. **Professional Standards Must Be Maintained**

It is essential if any changes are to be made that the professional standards must be either maintained or improved. This is obvious, but I mention it because the solution to the Professional Responsibility problem must ensure that standards are maintained so that there is no loss in public confidence.
6. **Finally, I believe the solution is in our own hands.**

   It is up to us to determine solution and promote its implementation. It would be wrong to blame the public for the situation we find ourselves in – perhaps we have the cause of the need for change.

   In conclusion, I would like to say this. We in the Engineering profession have after careful consideration believe that in the interests of the public and the profession, a professional’s liability should be limited by statute and that the profession should assume the responsibility in protecting the public up to the figure determined by statute. We would therefore strongly support the conclusion arrived at by Mr Duncan.
COMMENTARY

by Mr P.F. Menzies

I have come here today as someone who looks at this problem through the eyes of a client employing professional consultants and advisers. With open mind I have listened to the papers presented and the comments made.

In summary, we have heard three excellent papers. Starting with Mr Vautier the historical and evolutionary processes which have shaped the present law were clearly described. In recent years it is evident that professional people have become subject to ever increasing damages claims and his precise insight into the many professions dealt with was most instructive.

Mr Donald covered the problems faced by the Insurance industry. It appears the law has outpaced the insurance cover provided and made professional indemnity insurance most unattractive.

Mr Duncan's paper has dealt with the entire subject in some detail and provided several solutions, only one of which would appear acceptable at this time.

There are three factors, which focus on this one solution which is to limit professional liability by statute. Springing from Mr Vautier's paper is the concept of the role professional people play in society, and then on fundamentals which distinguish professionals from limited liability companies. As professionals you are using a skill, acquired through training and study, which requires constant improvement and expansion. You are required to employ this skill to the limits of your ability since this produces the greatest efficiency and helps expand the knowledge of your profession. In using skill to the limit a risk is involved and this must be acknowledged by society. To discourage professionals from working to the limit of their knowledge would be detrimental to society. Samuel's paper, referred to by Mr Duncan, clearly argues why society should acknowledge this risk and legally limit liability.

Any Company trading for profit must do so at some risk since profits can only be earned if risks are taken. It is not unreasonable to expect a Company to have risk associated with employment of professionals provided the extent of the risk is deferred. In employing a Manager for a profit centre the company concerned takes a substantial risk -- why not when professionals are employed.

Finally society has determined that you work as professionals and structured business relationships around the professions. While each of you entered your profession through a free choice it is unreasonable of society to place you in a situation where for one mistake or the mistake of a partner you can be made bankrupt. Samuel's paper again has referred to this.

In summary I think we have had a very clear exposition of the problem. We have looked at alternative solutions and the most satisfactory is to limit liability by statute. As the law expands to cover this problem changes will be required but there is sufficient evidence to support this solution in the present circumstances.
QUESTIONS ADDRESSED TO MR R.H. DUNCAN

Question:
Mr Bailey:
If a particular Engineer has put his home into his wife’s name and sought to protect his practice with insurance how can a statutory limitation be of benefit to him?

Reply:
Mr Duncan:
If by statute there is an upper limit of liability in respect of professional men similar to that applying to the National Airways Corporation the circumstances would be somewhat the same. A business man who travels by N.A.C. from Auckland to Wellington is aware that the airline has a responsibility but that it is limited. The business man is therefore left to elect whether to protect his family by taking out additional cover to that limited cover which N.A.C. is responsible for. In professional circumstances it is submitted that there should be an upper limit within which the professional person is responsible and that responsibility should continue. If a client dealing with the professional person wishes to insure against a greater risk than the upper limit fixed by the proposed statutory limitation then the client would be obliged to make particular arrangements himself. In the same way that the business man may do when he travels to Wellington.

Question:
Mr Bailey:
Some professional practices are very large but some are operated by one person on his own. If the limitation figure were a quarter of a million dollars this may be needed by a large practice but unnecessary in the case of a small practice.

Reply:
Mr Duncan:
It is not suggested that every practice requires a quarter of a million dollars of cover. What has been suggested is that no claim will lie if the amount of that claim is greater than a quarter of a million dollars. Mr Beca’s suggestion is that in return for limitation of liability by statute each professional person should be required to carry professional negligence insurance in an amount which may differ between professions and may differ in relation to the size of the professional practice. Perhaps a formula similar to that which applies in West Germany may prove to be appropriate.

Mr Beca:
Our views differ a little from those views expressed by Mr Duncan. We agree with Mr Duncan that a professional’s responsibility should be limited by statute. However, we believe, as stated earlier, that if a
professional's responsibility is to be limited by statute, then the
professions must accept the responsibility of ensuring that their
members are capable of accepting this responsibility — this means
that it will be mandatory for each practitioner to carry professional
indemnity insurance for the sum stated as his limit of responsibility.
Therefore it follows that a client is covered for the same sum
whether he seeks service from a small or large practice. The cost to
each practitioner will vary of course — generally the premium for
this insurance will be greater for a large practice than for a small
practice.
Also it should be noted that the sum stated by statute as the limit of
responsibility will vary for each profession. For example, at the
bottom of the ladder is the medical and dental professions. The value
at risk is only one life — Government would probably assess this at
$100,000 — $150,000. Whereas the Accountants and Engineers are
at the top of the ladder — the value at risk could be millions.
Government would probably assess the limit of responsibility for
them at say $500,000.
PANEL
Mr Hillyer

Ladies and Gentlemen. We are now at the last stage where the combined wisdom of the audience and the speakers during the day are to be focussed. The way in which we are proposing to run this is to invite questions from the floor and to direct them to the different speakers. We also invite comments from the floor so that nobody need feel unhappy in making a statement or feel that they have to make a statement and then turn it into a question by saying “Thats right, isn’t it?”

I should, indeed have been remiss in not apologising when I first stood up, for not being Maurice Casey. He unfortunately, has been detained in Wellington. He had some hopes that he would be able to get back to run this closing session because I should tell you that Maurice has been the driving force and inspiration to a very large extent behind this Seminar. Great credit should go to Maurice and it is a pity he is not here to receive it personally. I hope my remarks will be passed on to him.

So now could we have any comment from the floor to start this session.
Mr McKinnon:
Suggested that more effort to achieve higher standards of performance to limit the number of claims was required rather than concentrating on solving problems resulting from claims.

Reply:
Mr Vautier:
I am in hearty agreement with what has been said. I do think we do tend a little in this country and in most other countries today to think along the lines these things are inevitable and how we can pay for them and how we can spread the risk and so on. But I cannot comment any further than that.

Mr Beca:
The suggestion made by the Engineers, if adopted, will inevitably result in a larger measure of control, thus limiting the number and extent of claims. For example, if we place the onus on the individual for the first portion of the claim, and that this portion be relatively large, he will obviously be more careful, adopt sound administrative and technical procedures. Also education of our members on professional liability prevention should result in higher standards which in turn results in further control. These measures will go some way to meet Mr McKinnon’s suggestion, but obviously they will not completely solve or eliminate the problem.

Mr Menzies:
I think the point that has been raised here has been covered to some extent by the inter-action between insurers and the people who are making claims. The insurers are making available to them information of problem areas. 30% of claims resulted from mismanagement.

Question:
Mr Clarke:
Commented that experience over the past six years seemed to show that the principal occasion for solicitors and accountants in particular to have recourse to their Professional Negligence indemnifiers was a result of their having been dilatory. It is a cardinal sin to be dilatory in regard to one’s work. If one is dilatory in advising one’s underwriter one is not insured. The question in relation to the personal injuries sphere is that it would seem that under the new legislation about to become operative professional negligence underwriters will not have any problem where their insured causes personal injury because that will come under the scheme.
Reply:

Mr Hillyer:
That depends, of course, upon the extent which the new proposals of the Government are brought into force because under the previous scheme there were quite a number of people who were not covered by insurance. Specifically people who were not earning and who were not injured in motor car accidents. None of those people would be covered under the Accidents Compensation Act. So that, for example doctors who take a housewife into hospital and cut off her leg instead of delivering her baby would be found guilty of negligence, not surprisingly, and they would not be given indemnity under the provisions of the Accidents Compensation Act because they could not be classified as a motor car accident. But now I gather the government is proposing to cover everybody, including non-earners. Whether they are planning to cover people who have been in the country less than 6 months I do not know. There will be some areas in which indemnity will be required in respect of personal injury claims and it is going to be a very nice exercise on the part of underwriters to try and arrive at a fair premium for those people. Particularly as they are going to have to wait for five years to find out whether they have enough experience to find out whether the fees they are charging are too much.

Question:

Mr Clarke:
then asked whether a very large portion of the underwriter’s risk will be reduced.

Reply:

Mr Hillyer.

There is no question about that. So far as personal injury is concerned it is going to chop out a vast area.

Mr Duncan:

Doctors and dentists to be freed of liability will be protected by law for injuries sustained as a result of accident. There will be a question of how the Act defines “accident” and would this have some bearing on any “accident” in a surgical operation, etc. Is this likely to raise an area of concern for the medical profession?

Mr Hillyer:

The Medico Legal Committee on which I have been sitting has spent at least four full days trying to arrive at a definition of “accident”. We still have not got one. There are certain principles that we have arrived at and first of all we have come to the conclusion on liability — an accident should be an accident even if the person who causes the injury intended that injury to be caused. In other words, if I were to stand up and strike you over the head with a blunt instrument because I do not like insurance brokers, you might say it was not an accident. But as far as you are concerned it would be an
accident. The question of intent in an injury situation really depends on whether the person who has been injured intended it to happen to them, so with your doctor who deliberately cuts off a leg — it would still be an accident and that would still be covered if the person was an earner. Under the Accidents Compensation Act “every person who is an earner” — that is how it is termed. How it will be I do not know. If you are an earner in hospital you are still covered. Under the Act and the person who has caused you the injury is not liable. Anyone who is covered under the Accidents Compensation Act carries with his indemnity the freedom of the person who has caused the injury from any claim for damage.

**Question:**

Mr Adam:

Asked whether there is any provision in the Accidents Compensation Act for a cover for consequential losses arising from bodily injury. If it is not, there is still an exposure to risk so far as professional liability is concerned. The case where an employer suffers injury and as a result his employee is unemployed.

**Reply:**

Mr Hillyer:

Not covered. But a limited liability under the act for next of kin.

**Question:**

Mr Johnston:

Suggested that there were two aspects to be considered.

(a) Negligence resulting in a client being ruined;

(b) Responsibility to protect partners.

Would not incorporation of professional practices be sufficient to secure protection of innocent partners without affecting responsibility to the client.

**Reply:**

Mr Duncan:

The professions are concerned that responsibility is available to a client in full measure but the professional person is as well concerned that an innocent party does not suffer. The suggested incorporation of professional practices does not remove from the area of risk the actions of a practitioner but apart from his financial interest in the corporation avoids the risk being shared by his partners. I do not believe that this takes the matter far enough. I had hoped to suggest in my paper that the mischief we were seeking to cure was the openendedness of professional responsibility. I believe that my paper makes it clear that the professions should not seek to escape responsibility but rather should seek to put a limit on the amount of it. By so doing adequate insurance at an acceptable premium rate could be arranged. Each member of a professional
practice could be required to carry minimum insurance, indemnifiers of professional persons whether co-operatives or the insurance industry would be able to establish appropriate premia for a known risk. How we arrange the affairs of our respective professions to ensure that the community enjoys the advantage of complete cover within a ceiling is a matter for long and detailed consideration. My proposal was that liability should have a limit. Mr Beca’s example suggests that the limit might be a quarter of a million dollars. If it were, engineering firms and chartered accountants particularly could say, “We are prepared to be responsible for indemnity insurance up to an amount of a quarter of a million dollars but no further”. This would have the affect of excluding claims which can presently be made in excess of the greatest amount of insurance any firm is able to arrange and thus eliminate the danger which at present exists in the case of unlimited liability.

Mr Beca:

I obviously have not made myself clear if the speaker has in mind that our proposals are costly. So I had better go over the present and proposed systems again. Under present conditions, the consultant and his partners risk all their business and private assets, and, if they have chosen to take out professional indemnity insurance, the sum insured is also available to the client who has been wronged. However, under these conditions the client cannot assess his risk because he does not know the value of the professional’s business and private assets, nor does he know the amount, if any, of professional indemnity insurance the consultant is insured for. Under the proposed system the consultant and his partners accept responsibility for the first layer of any claim and a professional indemnity insurance taken out by the individual practices insures the client up to the sum determined by statute. Under this system the client knows his cover and therefore can assess his risk. If he requires greater cover he pays for additional insurance. This system is no more costly than the present system for similar cover – the difference is that the client knows what he is covered for and the risks involved.

Question:

Mr Johnston:

Asked whether the scheme suggested was that the profession should bear the risk for the individual who does not carry insurance up to the maximum:

Reply:

Mr Beca:

No. If we want limitation by statute we cannot expect the Government to agree unless it can be shown that the public is better
off. This means that the figure chosen as the limit of liability must be very reasonable and further it means that the profession must accept the responsibility to ensure that the public is protected for claims up to this sum. The profession provides this security by administering a professional indemnity fund maintained by its members, or by the members of the profession, compulsorily taking out professional indemnity insurance. Obviously if all the professions got together they could as a group readily provide this indemnity fund.

Mr Hillyer: Q.C.
A form of compulsory insurance that must be taken up by every professional man?

Mr Beca:
Yes, if we have limitation by statute we must insist that the professions protect the public for claims up to the sum chosen as the limit of responsibility.

Question:
Mr Bollard:
At present the sort of cover that is offered solicitors is a cover for a fixed sum which is reduced to the extent of any claims which may be met during the year for which the cover is given. With this minimum compulsory insurance that is advocated would it be necessary, if a claim is made, for the insured to immediately approach the insurer to reinstate the amount of insurance to its original figure so that every client would know there was this minimum cover at all times? Does Mr Donald, as an insurance broker, see any difficulty in providing such a cover?

Reply:
Mr Donald:
Under this scheme any client must be protected for this sum of money, so if there is a claim on the firm or a partner in a firm, then if his insurance is limited to a sum of money, then he has to reinsure immediately. This is one of the forms of control — in answer to Mr McKinnon's comment. If you have to do this you are going to go out of your way to see the public is protected. It permits better practice. In general terms it depends how this proposal is to be covered. Whether it is estimated per year and whether it is reinsured and so on. In terms of considering policies. If you notify you have a claim for $50,000, you have only $50,000 left out of a $100,000 policy and if you have another one tomorrow for $50,000, you have immediately extinguished it. We do not see many cases where there are a lot of claims from one firm in one year but this could happen. However there is a strong trend amongst the things I have mentioned previously of emergence
of this type of insurance and one of the things being offered is one automatic reinstatement. The insurance market endeavours to provide for the requirements of the profession in that sense.

Mr Menzies:
Go back to the question Mr Johnston asked – where he has expressed some concern about his premiums being increased. To me it is a very good aspect of the proposal Mr Beca has been explaining here today. In accepting the concept of a statutory limitation the public at large would let the professions “off the hook”. By having the whole profession involved an internal disciplinary system could be evolved where the profession could check on its members who have excessive claims and ensure they avoid such situations re-occurring. The collective aspect of this scheme has some very good things to it.

Mr Donald:
Now people will say “I have to have $250,000 cover” whereas now most of the professions have $30,000 or $50,000, so that it is what they are considering, the true cost, not considering unlimited liability. It would be taken on the statistical results of the thing. How much it would cost the individual practitioner.

Question:
Mr Gapes:
asked whether the computer operator who makes a mistake which could cost a vast sum of money is likely to be sued.

Reply:
Mr Duncan:
Each person who is negligent is potentially responsible. If he happens to be working for a large computer company the obvious target for a writ is the company rather than the individual as the employer company is responsible for the actions of its employees and the company has the sanction to dismiss the employee concerned. If however there is a company with a small capital and relatively insignificant assets it is more likely that the individual who was negligent will be joined with the company as a party to the proceedings for damages.

Question:
Mr Camplin
Expressed concern that the professions may not find Government very receptive to an approach for limitation of liability and therefore questioned whether the approach should be a limited one in the first instance.

Reply:
Mr Duncan:
I do not think we are conditioned as to what we believe in by the
possibility that Government may not necessarily favour our belief. I think we should first determine whether there is a mischief. We should then find an appropriate solution to that mischief. Today’s Seminar seems to testify to your endorsement of the recommendations of my paper. I have indicated the mischief of openended professional liability I have commented on the steps being taken by the professional bodies, the use of disclaimers and contractual limitation, the partial usefullness of incorporation to protect ones partners but my paper concludes with statutory limitation, as the only satisfactory answer. If all the professions consider there is sufficient reason to endorse these views then let us assist in getting the professions together. They will still require to research thoroughly and in any representation to Government they should remember that their representation should not take account only of protecting professional persons but also provide sound protection for the public that professional people serve. The professions should recognise above all else that if politicians are to be persuaded to bring about a statutory limitation of liability the professions must demonstrate to them that no political reaction is likely to result, indeed the professions should so present their case to show how political capital can be made from passing such legislation.

Question:
Mr Barnett:
Suggested it would be sufficient to limit our assets just to our professional assets and put all the remainder in someone elses name.

Reply:
Mr Vautier:
There is no other way to do this than to carry on your professional business in the form of a company. You are thinking of a statute that would define what professional assets were. Mr Duncan would probably think that was the same in a different guise.

Mr Duncan:
Very few of us are willing to earn our livelihood, pay our tax and give the residue to our family. There have been cases where persons have put considerable funds in their wife’s name but have lived to regret doing so.

Question:
Mr Styles:
Is it intended that no claim is to be made beyond the $250,000 that has been postulated or is it intended that the Government would be the ultimate underwriter.

Reply:
Mr Beca:
It is intended that the client cannot make a claim beyond this figure
whether it be a claim in contract or in tort. If a client wants greater protection he takes out further cover at his own expense.

**Question:**

**Mr Styles:**

Asked whether there is protection for the person who has lost say $500,000 through the negligence or fraud of an auditor.

**Reply:**

**Mr Donald:**

At present the person who engages his accountant, solicitor or engineer has not the remotest idea as to what cover he has, if any, or what his personal assets are. The prudent man will buy his professional indemnity. He might have bought $20,000 or he might have bought $50,000. If his personal asset is $50,000 and his indemnity is $50,000 the most he can get is $100,000. So if the indemnity is $250,000 the client is uncovered. If one puts $250,000 to this situation and the professions participate, the importance looked at from the client’s point of view – the client at least has $250,000 cover whereas today he has not any. I venture to suggest to you clients can still be pretty big but sometimes when a mishap occurs they ask somebody – “I have suffered. Is there some way I could have been indemnified?”.

**Question:**

**Mr Evans:**

Any situation which on the face of it fixes a statutory liability must favour the older and the larger firms.

(a) Because the larger firm will have a higher excess
(b) The larger the firm and the older the firm, the greater the possibility they will be handling higher risk work.
(c) The class of business that is involved must necessarily be taken into account.
(d) The difference in age.

If the premise is sound that the risk is related to our income does it not follow that our responsibility personally must relate to the number of years we have practiced?

**Reply:**

**Mr Vautier:**

It does occur to me, thinking of this statutory limitation of liability and insurance to this amount: These difficulties might be overcome by a form of corporate policy for each profession where members among themselves would be able to assess all these points and work out over some considerable time some total for a reserve and agree on an equitable division of the premiums that would have to be paid. I don’t know if the engineers for example were contemplating that.
Mr Donald:
Part of the discussion is related to the equitable charging of premium or contributions to this fund. When proposals are received by underwriters they are seeking to really measure. They have a guide line obviously they start from and in a rough sort of way they are increasing premium for higher risks and reducing for lower risks. We are arguing to get at this. For instance I have a letter from our people in London. They have 1800 firms in one particular scheme and know the instance of claims and where the claims are coming from. The bigger the firm the greater the propensity does not seem to be borne out. There has been a great deal of research in recent years but not on the underwriting side. The underwriter is therefore setting himself up as independent judge and jury and setting up a fund hopefully providing himself with the profit which he has not succeeded in doing, so far as I can find out. If the professions themselves adopt it fully they ought to adopt that method.

Mr Beca:
Mr Evans. In answer to your first question, I think the present position is that premiums are assessed on fee income and in addition take into consideration the past history and experience of a practice. The larger firms pay more than smaller firms and so on. Formulae can never be completely equitable but a reasonable compromise and can be changed from time to time in the light of experience. In answer to your second question I agree that if we limit our responsibility by statute, then certainly we cannot have any other disclaims as well.

Mr Donald:
Mr Beca said premiums are rated on fees. True of engineers, Basic rule of thumb with underwriters; they use the fee income as one of these rule of thumb areas to help them judge the activity in the business and that sort of thing. I think they are getting sufficient architects together. Certainly I see it in our own records. We know where to broke for the client. It is a risk measurement so that the two factors are still taken into account in most firms and once again it is used as a variable figure to work from.

Question:
Mr Clarke:
Suggested that the client and the professional would be better off under our present methods of practice rather than under the system proposed.

Reply:
Mr Beca:
I do not agree and I believe my earlier comments prove this. Let us take the example given by Mr Clarke and look at the situation from the Client and Professional’s point of view under present conditions and under the proposed system.
Firstly from the Consultants point of view: Under present conditions the consultant and his partners would loose all their business and private assets. (Any professional indemnity insurance would be insufficient to cover the loss). Under the proposed system the Consultant would be responsible for the sum of money stated by legislation as his limit of responsibility and this sum would be covered by insurance.

Secondly from the Client’s point of view: Under present conditions the Client would collect all the Consultant’s business and private assets, but this would be totally inadequate to cover the Client’s loss. In spite of the fact that the Consultant would be bankrupt, the Client’s losses would be very heavy — perhaps sufficient to send him bankrupt also. Under the proposed system the Client would receive the sum of money stated by legislation to be the limit of responsibility. However, under this system the Client would have been aware at the commencement of the project of the amount at risk and the amount covered by professional indemnity insurance. The Client thus being aware of his risk would have the opportunity of taking out a further insurance policy at his own cost if he wished to illiminate or reduce the risk.

To summarise, under present conditions the Consultant and Client are in an unsatisfactory, perhaps dangerous state, whereas under the proposed system, both are operating in a manner which is under their complete control.

Question:
Mr Atkins:
Suggested we should consider that the advantages of incorporation are sufficient at this stage.

Reply:
Mr Duncan:
I believe that it is too soon to approach Government with any proposition. My hope in presenting my paper was that I should at least clearly state the problem and a number of alternative solutions. If by so doing there emerges a solution which appeals to the various professions that is as far as the matter could be taken today. It may however result in the professions joining together forming a research team or establishing a group whose function it will be to establish the principle, test all factors, formulate a plan and ultimately present that plan to Government. For my part I would prefer a comprehensive solution which is simple, direct and complete. I would prefer to think that incorporation takes us only part of the way and I would prefer therefore to spend time researching a comprehensive solution and formulating an acceptable and appealing case to Government for a total solution.
CLOSING REMARKS

by P.G. Hillyer, Q.C.

Well gentlemen, and ladies, we have had a most informative, very instructive, a little long and possibly a little tiring day, but undoubtedly we have benefitted and I would like you to show your appreciation to the speakers for the enormous amount of work they have done, in the usual way.