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 deductable 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."

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."

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 responsibility. 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 openended 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. Moreoever, 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 presumptious 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 invevitable.
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 professsional 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 complicance 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 todays 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 statutary limit. Let us assume that this figure is set at ¼ 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 ¼ 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 ¼ 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 ¼million. The professional is not likely to be worth more than ¼ 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 statutary 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 catastrophies 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 rsk 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.