CHAPTER 7

RESPONSIBILITY:

ANSWERABLE IN FULL One of the essential characteristics of the professional consultant is that he should accept full personal responsibility for the advice he gives. An explicit statement of this principle was published by the Council of the Institute of Chartered Accountants in 1961: "The Council emphasises the personal responsibility of every member of the Institute for his pro- fessional conduct; this applies regardless of the way in which the work of the member is organised and of the medium through which it is per- formed." (1) The code of the Architects' Registration Council forbids an architect to do any act which will have the effect of avoiding his responsibility to his client. (2) The Declaration of Geneva stigmatises as "unethical" collaboration in any form of medical service in which the doctor does not have professional independence, that is where ultimate responsibility lies with someone else. (3)

It is this undertaking of full responsibility which distinguishes the professional man from the auxiliary or technician operating in the same field. The complexity of most professional techniques requires that the fully qualified practitioner shall be assisted by subordinates who, while having some knowledge of the techniques involved, are without the full professional training. The technician of today is a valuable member of the team, very often trained for that purpose. He succeeds the untrained clerk, who nevertheless frequently made up in experience what he lacked in formal qualifications.

Many a solicitor's office has depended for its smooth functioning on the quality and experience of its managing clerks. These are now renamed legal executives, and in the case of newcomers undergo train- ing as such. An Institute of Legal Executives was formed in 1963 and has a current membership of more than 13,000. Similarly in the archi- tects' field there was formed in 1966 the Association of Architectural and Allied Technicians, embracing ancillary grades in the field not only of architecture but also engineering and surveying. It is significant that the tendency for technicians to develop organisational structures resem- bling those of the professions themselves is displaying a pattern under which they are grouped in separate entities rather than as junior grades 98 RESPONSIBILITY:

ANSWERABLE IN FULL 99 within the professional bodies. This follows protracted debates in the professional bodies as to the relative advantages of having technicians under their own eye or organised in separate and independent groupings. The decisive factor has been the fear of the professional bodies that if they admitted technicians to membership in any shape or form the public would inevitably confuse fully qualified members of the profes- sion with the technician grades, thus blurring an essential distinction. Professional bodies have nevertheless taken a leading part in founding the technicians' representative bodies and in helping them to devise syllabuses for training.

If responsibility is one of the essential characteristics of the full pro- fessional, to whom is it owed? The primary duty is to the client, but there is also a responsibility owed to the profession, and in some instances to a member of another profession. Finally a professional man may be looked on as owing a responsibility to society at large.

The responsibility to the client is primarily a legal one, usually though not always enforceable in the civil courts. This means that its exact nature and scope may be affected by the terms of any contract entered into between client and practitioner. In the absence of an express contract the law will imply a contract. This will not place an unlimited obligation on the practitioner. It will render him liable for fraud, bad faith or negligence, but will not go to the extent of treating him as a guarantor of the accuracy of his advice or its effectiveness in dealing with the circumstances to which it is directed.

Where, as sometimes happens, there is in law no contract governing the circumstances in which advice is given, the consultant's duty to take care is derived from the legal rules governing the tort of negligence. The practical difference between a duty arising under an implied contract or in tort is slight; in either case the law expects a person engaged in a transaction where he holds himself out as having professional skill to show the average amount of competence associated with the proper discharge of the duties of his profession. Whether or not legal liability exists to the client, the professional body may treat failure to display proper professional skill as amounting to misconduct. This is particularly important in the case of barristers, who cannot be sued in negligence. Thus the professional sanctions reinforce, or supply the lack of, legal sanctions. They would also in effect enforce a duty to a member of another profession. Thus if a solicitor failed to prepare a case properly, and his neglect caused the barrister handling the case in court to fail in his duty, disciplinary proceedings might be taken against the solicitor on the complaint of the barrister. The latter is specifically told that he should be able to rely on the responsibility of a solicitor as to the

 statement of facts put before him. (4)

It is unrealistic to expect anyone to shoulder responsibility unless he is accorded a degree of authority sufficient to enable him to see that the responsibility is effectively discharged. Thus barristers are told that it is not becoming for Counsel to accept a brief limiting his ordinary author- ity or to take a position subordinate to a non-barrister in the conduct of a case. (5) An example of an improper limitation on Counsel's authority would be imposing a condition that his discretion as to offer- ing no evidence is fettered.

Why is such a rule imposed? In many cases it is required in the public interest; thus a barrister who has had his authority limited may be unable adequately to perform his duty to the court. Apart from this sort of consideration however the client himself is likely to suffer if he attempts to deny his professional consultant the authority requisite. An example of this is given by Norman J. Hodgkinson in discussing the duties of an auctioneer. He tells how, before holding an auction of a large agricultural estate, he called on the owner to discuss what reserve prices should be fixed for the various lots. The client cut him short by saying that when he engaged Gordon Richards to ride one of his horses he did not tell him how to ride the race. Given unlimited discretion by his client, the auctioneer realised a very good total. Hodgkinson com- ments: "Such clients are exceptional, but it is usually possible to per- suade a client to give certain limited discretion to the auctioneer conducting the sale. As I have said, it is always in his interest to do so, and great though the auctioneer's responsibility may be in consequence, such discretion should always be asked for and welcomed when given." (6) In another place Hodgkinson points out that it is never the slightest use trying to shelve responsibility by leaving the decision to the client. "If the decision turns out to be a wrong one, your client will blame you for it just the same, and will only be irritated if it is pointed out to him that it was, in fact, his decision." (7) Nor should the consultant take refuge in ambiguities. Lord Westbury in advising on a case was always clear and direct, saying he was 'paid for his opinion, not for his doubts'. (8)

The need for a professional consultant to be in a position of full authority is recognised internationally. Thus the European Code laying down the professional obligations of the accountant states that it is incompatible with professional practice to accept any public function or commission placing the accountant in a position of subordination. (9) Vicarious Liability

In professional practice, as in law, the responsibility of the consultant covers not merely his own acts and omissions but also those of his partners and the staff of the firm. Thus we find the byelaws of the R.I.C.S. stating specifically that "members who are principals will be held responsible for the acts of their partners and staffs so far as they relate to matters coming within the scope of their practice". (10) To discourage evasion of this responsibility by allowing an employee to act on behalf of the firm under his own name, the Institute of Chartered Accountants have expressly prohibited this practice in one of its five fundamental rules.

In the rare cases where professional activities are allowed to be carried on through the medium of an incorporated body the profes- sional man who is a member of the company is vicariously liable for its acts. Thus a chartered accountant who is a member of a company carrying out accountancy services is responsible for the conduct of the company and its directors and officers as if the company were a firm and he were a partner. (11)

Although vicarious liability clearly exists, punishment for its breach is likely to be less severe. A solicitor's managing clerk took advantage of the ignorance of a client who wished to be represented under the poor persons rules by suggesting that if the client paid the usual fee his case would be dealt with more quickly. Only a nominal penalty was imposed on the employing solicitor in view of his absence on war service at the time in question. (12) Responsibility as an Employee

Where a person carries out the duties of his profession as an employee he remains responsible in the eyes of the profession, though in law the responsibility may be his employer's. Where he is employed by private practitioners in the same profession no problems are likely to arise. Where however the employer is a lay person, unfamiliar with the rules and practices of the profession, there may be conflict between the wishes of the employer and the professional duty of the employee. The professional institution will hold an employee in such circumstances responsible for ensuring that no act of his employer leads to a breach of any professional rule. Nor may the employee "cover" the employer by enabling him in effect to carry on the profession with the use of the employee's qualifications and name (see page 54). He must not permit the employer to receive, whether directly or indirectly, fees earned by him from clients other than the employer, even if the employer has assumed responsibility for payment of those fees (as when the other clients are lay persons in the same employment).

The Law Society have laid down rules designed to ensure that, so

 far as concerns solicitors' work, the legal department of a company is run as nearly as possible on the same lines as a private firm. The department must be controlled by a solicitor with a practising certificate and solicitors' functions must be performed by the solicitor in his own name. (13)

Architects are free to take salaried employment with companies which provide architectural services. This means that a firm of building contractors offering an architectural service in competition with archi- tects in private practice is free to employ its own architects to enable it to do so. Such companies may in certain circumstances describe them- selves as architects. (1 4) Practice Through Limited Liability Companies

Most professions regard it as a cardinal rule that members should not practise the profession through the medium of limited liability com- panies. The rule partly arises through a desire to maintain the personal relationship between practitioner and client (see page 68). In the main however it is directed to preserving in its full rigour the responsibility of the practitioner for the advice he gives. Another reason is that, while a member may be restricted in assigning his shares in the company during his lifetime, there is nothing to prevent them going on his death to an unqualified person who would thus in effect come to be carrying on a professional practice. As Carr-Saunders and Wilson point out, this is bound to undermine the responsibility of practitioner to client. (15)

Principle V of the Architects Registration Council Code forbids an architect to carry on his practice in the form of a limited liability company. The R.I.B.A. code does not include this provision, but the Institute say there is no special reason for the omission, and the R.I.B.A. has always accepted that all its members in private practice are bound to accept full personal responsibility for their professional con- duct. (16) The chartered accountants have a similar rule, which is one of their five fundamental principles. It is justified on the ground that public accountancy is essentially a personal service calling for long training and experience and the assumption of heavy legal respon- sibilities and personal responsibility to the client for the standard and consequences of the work done. (17) The Association of Consulting Engineers prohibits practice in respect of work on sites in the United Kingdom under the protection of limited liability. (18)

Some professions only adopted the rule against limited liability com- paratively recently. This was so in the case of the chartered surveyors, whose rule states that in order that members shall accept full personal liability for advice given to clients, they will not be permitted to convert RESPONSIBILITY:

ANSWERABLE IN FULL 103 their firms into limited liability companies, or otherwise to carry on practice under the protection of limited liability, unless special circum- stances approved by the Council of the Institution exist. (19) This rule was only adopted however as late as 1932.

Professional people have at times felt that the rule imposed hardship on them in restricting their ability to withdraw capital and minimise taxation. The rule has also been criticised for its effect in keeping down the size of professional organisations and hampering the raising of capital needed for investing in expensive equipment. The chartered surveyors and kindred societies have avoided extreme hardship by sparing use of the escape clause allowing permission for limited liability to be given in special cases. Such dispensations have however been virtually limited to firms already practising when the rule was intro- duced, firms carrying on livestock auctioneering (which requires the provision of markets), photogrammetry companies engaged in aerial surveying, and firms practising overseas. Service Companies

The prohibition on limited liability only applies to activities carried on by way of the practice of the profession. Some of the disadvantages mentioned above have therefore been avoided by the creation of service companies. The function of these is to provide a service for a profes- sional firm by acquiring, holding and maintaining the office premises, providing furniture, stationery and equipment and employing the unqualified members of the staff, such as clerks, typists, book-keepers and the like.* The service company makes a profit by charging the firm on a cost-plus basis for the services it provides. The fee paid by the firm is an allowable deduction for tax purposes, and the "profit" made by the service company represents an asset in the hands of the partners which, if kept to a modest proportion, avoids surtax. It should be noted that the shares in the service company are normally required to be held by the partners of the professional firm and not by outsiders. If they were held by outsiders there would be a risk of the firm's remuneration being shared with non-members of the profession (see page 89). The advent of corporation tax and capital gains tax has lessened the attrac- tion of service companies, and it remains to be seen how far they will continue to be a useful device.

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The Pilkington Commission found in 1956-7 that the average capital outlay for each principal in firms of accountants, actuaries, solicitors, architects, surveyors and engineers returned in an enquiry carried out in 1958 varied from £1,995 (architects) up to £7,336 (engineers) — Pilkington Report, p.48. By 1968 the figure for solicitors had risen from £3,844 to £7,060 (Cmnd. 3529. p.10). The state-financed General Practice Finance Corporation lends capital for medical practices.

The professions do not generally bar the carrying on of practice by companies if liability is unlimited, though the Solicitors Acts are so worded that it is legally essential to carry on a solicitor's practice in person and not through a body corporate. (20) The Companies Acts provide for incorporation with unlimited liability, and it may have advantages in assisting in the raising and withdrawal of capital. Although few have made express rules to this effect, the professions would presumably object to any arrangement under which the shares in an unlimited company were held by persons other than members of the profession. There are believed to be few unlimited-liability companies practising any profession, but the Institute of Chartered Accountants has considered it worth laying down fairly detailed rules about how they are to operate. They must conform to all the rules which apply to a member in practice, and must not have a name which indicates the activities of the company or use the designation "chartered accountants". They must not be used as a means of sharing profits or remuneration with a non-member of the profession. (21) Other Forms of Limitation on Liability

While attaching great importance to preventing limitation of liability through the formation of limited companies, the professions have done little to restrain another type of limitation. This is the entering into a contract including terms absolving the professional consultant from the whole or any part of his obligation to the client. There is nothing in law to prevent this being done, provided the client is made fully aware of it. That it is not done frequently is probably due to the fact that clients would speedily abandon any practitioner who seriously attempted to strike at the roots of professional service by taking away their legal protection.

While there is every objection in principle to contracts being so framed as to save a professional man from the consequences of his ineptitude, there is no such objection to a contract which relieves from liability by indicating what the professional man is purporting to do for his client and what he is not. A good example is structural surveys of buildings. A householder will often ask a surveyor to report on the state of the house at a time when it is fully equipped with furniture, carpeting and other furnishings. In such circumstances it is impossible for the surveyor to scrutinise every part of the fabric. A similar difficulty arises even in the case of an empty house where the client is not prepared to pay a fee adequately reflecting the amount of time necessary to examine every detail. In such cases the surveyor is justified RESPONSIBILITY:

ANSWERABLE IN FULL 105 in stating that his report covers only those parts of the building that he has been able to examine. This is not a limitation of liability but a clear indication of how far the professional service extends.

More controversial is the rule of law which exempts barristers from liability for negligence. As stated above, this rule will not absolve a barrister from disciplinary proceedings, but these will not afford any financial recompense to an aggrieved client. The immunity of a barrister from actions for negligence in respect of his handling of court proceed- ings was confirmed by the House of Lords in the recent case of Rondel v. Worsley. (22) A man convicted of causing bodily harm had been defended on a dock brief by a barrister who was alleged by the convict to have acted negligently. The convict sued, but it was held that no such action could be entertained. The administration of justice requires that a barrister should be able to carry out his duty to the court fear- lessly and independently, without worrying about the possibility of actions against himself. He is obliged to accept any client — even the most awkward and litigious — and might be plagued with suits if the law were otherwise. Finally, such actions would virtually involve a retrial of the original case; this would be against the public interest, which requires finality in litigation. The same protection is given to a solicitor in relation to matters which might have been conducted by counsel. Compensating the Client

The rule against limited liability is based on the proposition that a professional man should back his advice with his whole personal fortune. While this has a splendid ring, and may once have been some protection to the public, it is hardly a valid safeguard today. Most professional people have Uttle in the way of personal fortune, while frequently called upon to advise on matters involving very large sums. It is the clear duty of the professions therefore to insist that their members enter into suitable arrangements, by means of insurance or otherwise, to make certain that claims can be met. Strangely enough, however, although one or two professions have set up compensation funds, very few insist on indemnity insurance being taken out by members. The fact that for their own protection most professional people do insure against claims through negligence does not absolve the professions from making such insurance compulsory where no alternative safeguards are provided.

Most elaborate of such alternative arrangements is the Solicitors' Compensation Fund. The Fund was established by Act of Parliament in 1941, and is fed by contributions from solicitors themselves. Grants are made out of the Fund where loss is caused in consequence of

 dishonesty by a solicitor or his clerk or servant. It is not available to meet claims arising out of negligence or other misconduct short of dishonesty. The fund was set up under the initiative of

the Law Society, and is administered by it on a discretionary basis. To date all admitted claims have been paid in full. (23)

Another form of protection, recently established in the case of estate agents, is the “honesty bond” system. As operatcd by the Estate Agents Council this involves the taking out of an overall insurance policy by the Council, to which each registered agent may become a party. It is a condition of registration that the agent should either become a party to the bond or make other adequate arrangements. The cover thus given enables persons who have suffered loss through dishonesty to be recom- pensed where the Council thinks fit.

The wide range of possible liabilities arising in the case of professional firms makes it desirable to have a correspondingly wide-ranging profes- sional indemnity insurance policy. This would cover not only negligent advice to clients, but liability for negligent statements to others arising under a doctrine laid down by the Courts in 1963 in the ease of Hedley Byrne v. Heller; liability for libel or slander; liability for damage to goods, including documents deposited with the firm; and, in the case of auctioneers, liabiliity for the torts of conversion and detinue. (24)

A further safeguard for clients is the rule that a separate bank account must be opened for clients’ money, so that it is not mixed with money belonging to the firm. While this does not provide a complete safeguard, since the principals of the firm cannot be prevented from drawing on the clients’ account, it does have certain advantages. The bank is put on enquiry if cheques for items obviously not relating to clients are drawn on the clients’ account. Partners have no excuse for not being aware that their clients’ account is overdrawn when such is the case.

The professions have again been strangely reluctant to impose the keeping of separate clients’ accounts as a positive rule of conduct. The Chartered Surveyors, for example, did not adopt the rule until as late as 1966. The solicitors have the most developed rules, but even these only date back to 1933 and have been very greatly strengthened since the last war. Apart from separation of clients’ bank accounts, they require the keeping of proper books of account which will show clients’ moneys distinguished from those of the firm and the moneys of each client distinct from those of all the others. The money of one client must not be used for financing another, and there must always be in the clients’ bank account a sufficient sum to meet the solicitor’s total liabilities to his clients.

It is difficult to resist the conclusion that safeguards of the kind RESPONSIBILITY:

ANSWERABLE IN FULL 107 mentioned here would, if made universal, provide adequate protection without the need for a rule against the formation of limited liability companies. Preservation of such a rule suggests a more deep-rooted objection, which is probably really an objection to incorporation itself. This compares with the situation in other countries such as Canada, where the suffix” Limited” is regarded as a sign of status, welcomed by the public and therefore used by practitioners. In this of course the public deceive themselves; a far better safeguard would be knowledge that a particular firm bears the professional hallmark and that this involves compulsory safeguards such as indemnity insurance and proper accounting rules.