

Profession and Function

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1 Limits and History

Professional negligence is a dynamic concept in both scope and content. In present day society, a growing number of occupations are included in the concept and its norms, and the requirements placed upon the individual member have increased relative to the post-war period.¹

This expansion harmonises, however, with developments in tort law, insofar as liability in tort has gained application in areas extending outside the traditional *culpa* rule. As early as the late 1950s, it was evident that the courts were imposing liability in tort in areas outside *culpa* where statute law does not provide strict liability.² The courts expanded liability in three ways.³

- 1) Presumption of negligence (the burden of proof falls on the tortfeasor)
- 2) Vicarious liability of independent contractors⁴
- 3) Stronger requirements regarding duty of care, especially with regard to professional error
- 4) Strict liability (without fault) for certain dangerous activities.⁵
 - a) Explosions
 - b) Military exercises
 - c) Public road constructions
 - d) Public and private supply systems (water, sewerage, gas)
 - e) Failure of materials.

¹ Stig Jørgensen, *Professionelt ansvar i skandinavisk ret*, Juristen 1967, p. 425.

² Railway operations, power plants, aviation, motoring, nuclear plants and dogs.

³ Stig Jørgensen, *Towards Strict liability in Tort*, Sc. St. L., Vol. 7, 1963, p. 25 ff.

⁴ Under the Danish constitution of King Christian V 3:19:2, the employer is liable for torts committed by his employees.

⁵ In a comment on a Danish Supreme Court Judgment, UfR 1991:674 in UfR 1992, Sect. B 34 ff., a supreme court judge declares that in the absence of statutory authority, the courts can go no further in imposing strict liability.

The main issue was, however, the general extension of the duty of care which followed with the twentieth century's growth in technological development and coincided with the development of liability insurance which was made compulsory for motor vehicles as early as 1916 and tied to later provisions on strict liability. The extension of liability within "professional error" also developed a second prong in so far as the special exemption from liability for damage on insured objects in the absence of *mens rea* or gross negligence (Section 25 of the Insurance Contracts Act, now Section 19 of the Liability for Damages Act) was denied in cases involving "professional error".

The development thus briefly sketched also coincided with the expansion in product liability during the twentieth century, culminating in the establishment of the manufacturer's (and supplier's) strict liability for *defective* products under Council Directive 85/374/EEC.⁶ Indeed, professional liability and product liability share a common feature. This is the fact that the liability derives from a contractual relationship, from where it develops into a liability extending beyond the contractual relationship in the sense that it includes persons who were not governed by the contract. The contractual element is one of the factors defining the parties' obligations. It follows that a contractual element increases the scope for imposing liability for omissions, which are only actionable in tort to a limited extent.

In one of its draft directives, the European Commission supports moves to supplement product liability by strict liability for the suppliers of services⁷ on the grounds that it can be difficult, for example, to separate liability for drugs from the professional liability of doctors and hospitals. In fact, Danish legislation already combines strict liability for hospital treatment and strict liability for drugs.⁸ Although there is general recognition that the level of quality is rising in the labour market, the Danish attitude until now has been that it is still too early to contemplate strict liability for all suppliers of services in general.⁹

If we go far enough back in time, there was no fundamental difference between contract and tort, the central element in primitive legal systems being enforcement of the law for the breach of an "obligation". Gradually, as these consequences assumed the character of firm practice, a penalty catalogue took form which was later reflected in the development of a "claim" to monetary compensation (*condemnatio semper pecuniaria*).¹⁰ The doctrine of privity of contract was later to arise out of this state of law, establishing that a contract can only impose liability on the parties who entered into the contract. In non-contractual relationships involving

⁶ Act No. 371 of 7 June 1989 on product liability which governs personal injury and damage to consumer goods. Strict liability applies outside the scope of the Act for errors in design, supervision and manufacture, with the exception of the so-called "*udviklingsskader*" (damage/injuries of the type which could not have been foreseen when the product was put into circulation). On European law in the area, see *Product Liability. European Laws and Practice*, general ed. Christopher J.S. Hodges, 1993.

⁷ Proposal for a Council Directive on the Liability of Suppliers of Services OJ C 012, 18/01/1991 p. 0008. See Morten Samuelsen, *Advokaten*, 1991, p. 194.

⁸ Liability of hospitals in the form of a publicly funded patient insurance scheme, liability for drugs in the form of an NPO financed by consumers: cf. below.

⁹ See Sonny Kristoffersen, *Nordisk Forsikringstidsskrift*, 1991, pp. 303-10.

¹⁰ See Stig Jørgensen, *Naturaleksektion*, UfR 1962 B. 165.

persons or material goods, a duty of care only exists if negligence can be established, i.e. the wrongful act involved a foreseeable risk of damage or injury.

Any person responsible for the safety of other people or of goods belonging to others, or a person who has special obligations to the general public such as millers, innkeepers and signalmen, could incur liability in tort or liability for failing in their duty to act. Nevertheless, it was only during the twentieth century that product liability and professional liability became relevant issues for persons other than contractual parties. With respect to product liability, the legislative history of the Nordic Sale of Goods Acts from 1907 made it clear that any liability for third party injury or damage caused by the dangerous qualities of the goods sold and extending beyond the general law of damages lay outside the scope of the Sales of Goods Act, and should be decided under the law of torts.

In the same manner, injury or damage to persons or property in the contractual care of others was handled under the rules of tort, although the obligations were of course also defined in the contract. Thus Section 5 of the Product Liability Act, which defines the concept of defective goods, sets down marketing as an important element of the definition. Nevertheless, Danish case law on product and professional liability shows no firm guidelines for when liability should be based in contract or in tort.¹¹

Professional liability generally only applies to persons employed in the “liberal professions”, not to employees in public or private bureaucracies.

2 Definition – Topology

Most definitions of the concept of “profession” list the following four features as characteristic elements:

- 1) A particularly high standard of service and/or work.
- 2) A particularly high work-related moral standard, which exceeds general moral requirements.
- 3) Membership of a collective organisation which governs access to the profession and sets its code of conduct.
- 4) A particular social status conferred by special legislation or other public authorisation, or membership of another socially recognised professional society.¹²

Early professions to develop a separate identity on the basis of a particular high-status academic education were lawyers and doctors. Technical and financial professions such as architects, engineers, accountants and insurance brokers came later, and these have recently been followed by a string of new professions including banking and credit advisers and real estate agents. The concept has thus become more fluid while the number of functions has increased and changed, even to the extent of possible overlap among the many professions and functions, such as

¹¹ Bernhard Gomard, *Erstatningsansvaret i og uden for kontraktsforhold*, 1958.

¹² Rupert M. Jackson & John L. Powell (eds.), *Jackson & Powell on Professional Negligence*, 4th ed. 1997, pp. 2-4. See also John Cooke and D.W. Oughton, *The Common Law of Obligations*, 3rd ed., 2000, Ch. 10.

lawyers acting as board members under company law, and responsibility for the statutory building report which must be prepared in connection with property transactions.

Generally speaking, the concept of “profession” is undergoing continuing development as new services develop into “professions”, each with its own expert qualifications, organisation, authorisation and ethics. One example is the buying and selling of property, a sector which has undergone an explosive development in recent decades. In the post-war period, real estate agents were barely above the level of horse dealers. Now, however, this sector is on a level with other financial activities.¹³ The liability of real estate agents for giving wrong advice is even more extensive than that of lawyers (cf. below).

The courts have gone even further in using formulations highly reminiscent of the doctrine of professional negligence in relation to technical installations such as electricity, water, gas and other services requiring state authorisation, as also in relation to public and private sector services provided on the basis of teaching, social or health education (see below).

Developments in the credit and financing markets in particular, where banking, mortgaging, real estate and insurance activities are merging, have led to a situation where advisers, especially in the banking sector, perform a string of different *advisory functions*, while as officers on performance-related salaries, they also have a personal interest in selling certain services rather than others.

In the following discussion, it is therefore important to keep a steady focus not only on traditional professional liability, but also on the developments which have taken place generally in the twentieth century in the law of torts and in liability of service providers. These developments are extensions in the duty of care which have followed in step with the technological society’s ever-increasing requirements with respect to qualifications, combined with ever more stringent requirements regarding defects in products. All of this has accompanied the emergence of a view of the consumer as a naïve layman in need of protection against the big technological and financial organisations which alone can afford to limit their risk and insure themselves against any failure to fulfil the requirements governing their professional functions.

The basis on which individual actions are assessed must be the particular social function performed by the individual and the requirements which apply to the performance of that function. This statement follows from the doctrine contained in Section 32 of the Act on Contracts, which states that the position in law of such actions must be determined by society’s justified expectations of the level of qualifications involved. To complicate matters, however, the doctrine laid down in Section 18 of the Act can lead to the opposite result, making the profession and not the functions the decisive element, in so far, at least, as this is to the advantage of the consumer.¹⁴

¹³ Section 8 of Act No. 453 of 30/6/1993 on the sale of real estate, which places authorised real estate agents on a par with lawyers and bankers in terms of the purchase and sale of property.

¹⁴ The legislative history of Section 18 of the Act on Contracts awards a “special existence” (e.g. in writing) to circumstances which grant the agent his authority, *even if the authority was not produced*: cf. below, Note 24 on Judgment of 19/6/1997 by the high court *Vestre Landsret* (Magnus 97:700).

3 The Individual Professions and Functions

3.1 *The Health Services*

As the principal focus of this paper is directed towards advisory functions and the financial sector, we shall here provide only a summary sketch of developments within medicine. A debate lasting from the 1930s to the 1990s was the question of whether and how to revise the traditional *culpa* rule applying to doctors and hospitals. The debate was motivated partly by the growing need to protect patients and partly by a wish to release doctors from the unpleasant obligation, following from this need, to admit the existence of an error. Several proposals aimed at extending liability to a presumption of negligence and to introducing strict liability for defective apparatus¹⁵ gradually led to a patient insurance scheme on the Swedish model,¹⁶ under which public hospitals are liable for patients injured in the course of examination or treatment, and which requires hospitals to join an approved insurance scheme. The primary health sector and private hospitals are not yet included in the scheme, although plans are now underway to include these too.¹⁷

Despite the need for uniform rules, formal European legal grounds in the form of a minimum Directive 85/374/EEC on product liability prevented the introduction of similar regulations for drugs. A scheme was therefore introduced providing compensation via a pool system (financed by a tax on drugs) for unintended and unreasonable side effects from the use of drugs.¹⁸ Two accidents, one involving the pill and the other infection by the HIV virus, merely served to highlight the need for such a scheme, not least with regard to damage/injuries of the type which could not have been foreseen when the product was put into circulation, as this type is exempt from product liability, and with regard to causation, which is reduced to the “balance of probabilities”.¹⁹

We shall not explore the professional liability of the health sector in any greater detail, apart from commenting that given their level of education and function, present day nurses must be deemed to belong to a profession with extended liability on a par with teachers and advisers in professional and other organisations (see further below). One case does, however, deserve mention. The case involved a general practitioner who was acquitted of giving negligent advice in connection with having omitted to obtain a specialist’s certificate which he was required by law to submit to his patient’s employer, thus causing the patient to be dismissed from his job, as the doctor had expressed doubts as to the adequacy of the measure and advised the patient to ask his union.²⁰ In another case, the union was found guilty of

¹⁵ UfR 1960:576 H (Liability for a defective anaesthetising unit).

¹⁶ Act No. 367 of 6/6/1991.

¹⁷ White Paper on revision of the Act on Patient Insurance, No. 1346, 1997.

¹⁸ Act No. 1120 of 20/12/1995.

¹⁹ UfR 1989:135 H (no proof of causation between the pill and thrombosis), UfR 1996:1554 H (dismissal of most claims by HIV-infected haemophiliacs on the grounds that they were infected before there was any effective treatment of the blood available. The drug company was acquitted for lack of evidence, while the public health authorities were convicted).

²⁰ UfR 1997:812.

giving negligent advice to a member who missed out on a pension scheme.²¹ An agricultural consultant was similarly found guilty of giving negligent advice in relation to a debt rescheduling,²² and a patent bureau provided negligent advice on pattern protection²³ (see below).

3.2 *Architects, Engineers and Other Technical Experts*

There has also been an increase in the liability imposed on technical experts, firstly in the sense that the number of technical professions has grown in step with higher requirements regarding qualifications – an example is authorised plumbers and electricians, who have been treated according to the standards of a profession²⁴ – secondly in the sense that the standard of liability is approaching a presumption of negligence, where the technical expert must refute the presumption of defective design and supervision²⁵ – and finally in the sense that there is a causal link between the defect and the damage.

3.3 *Building Experts*

A 1995²⁶ act introduced a new concept involving a scheme of home inspections aimed at safeguarding buyers against properties with hidden defects. The building expert prepares a “building report” which the buyer receives, and the seller is then exempt from liability for defects, as the scheme presumes that a transfer of ownership insurance has been taken out at buyer’s cost.²⁷ One peculiar element of the scheme is that although, as a general rule, the building expert must have formal technical qualifications in building construction, he can also qualify through extensive experience as a claims assessor or similar.

The fact that various qualifications are acceptable makes it difficult to select the right professional standard for building experts. The one element they share is the *sui generis* function which they must perform. Given the purpose of the scheme, which is to safeguard the consumer against hidden defects for which the seller

²¹ UfR 1991:903 H, but not to a non-member: UfR 2000.90.

²² High court *Vestre Landsret*, Judgment of 22/11/1996 (Magnus 1996:249), see also UfR 1990:482 (energy consultant).

²³ Judgment by the Maritime and Commercial Court in Copenhagen, 21/4/1998 (Magnus 1998:357).

²⁴ High court *Vestre Landsret* Judgment of 19/6/1997 (Magnus 97:700). (A person who was not a professional trench digger must be judged by a “professional standard”, as he had presented himself to the house owner as such); UfR 1990:482 (energy consultant).

²⁵ But also that a cheaper construction had been chosen: UfR 1968:84 H (excavation caused damage to the neighbour); UfR 1973:675 H (cheaper materials); UfR 1985:555 H (condensed water); UfR 1974:299 H (architects, materials); UfR 1973:675 H.

²⁶ No. 391 of 14/6/1995 on consumer protection in connection with the acquisition of real estate, Section 5.

²⁷ As the buyer often omitted taking out the insurance in order to save costs, it is now proposed that the parties be required to share the costs in order to safeguard the buyer.

would otherwise be responsible, liability presumably rests with the person who acted in the capacity of expert in relation to the buyer, and this person would presumably be responsible under the same professional standard as a “building technician”, but one cannot be sure (*UfR* 2000:1248 and *UfR* 1999:2062.²⁸) The judgment in *UfR* 2000:2505 (see Note 28 below) did not impose liability although the “expert” was an architect, because the rules were followed.

3.4 *Financial Advice: Property Transactions*

Earlier, when each of the various professions acted out their special role in commercial life, it was a relatively simple matter to specify the obligations of individual professions in accordance with their particular education and code of conduct. Property transactions in particular were dominated by sharp divisions of roles: the real estate agent arranged sales on the basis of contract notes containing all the major terms of price and financing, while the banks provided the requisite short-term financing of a sale and part of the buyer’s cash payment in the form of a mortgage securing purchase money; solicitors formalised the legal documents (title deed and mortgages), while the credit unions provided long-term mortgages through bonds sold on the stock exchange at current prices while insurance agents and brokers took out insurances on behalf of the companies they represented.

More recent decades have seen a development involving the integration in one step of all the various functions, the consequence of which has been the cancellation of differences in professional requirements along with requirements regarding the provision of professional advice. New problems arise, however, when the same person or institution acts variously in the role of real estate agent, bank adviser, credit provider and solicitor. The finance sector has engaged in a dramatic wave of mergers, not only among individual institutions, but also across institutional boundaries, with the result that banks and credit institutions are now providing both short- and long-term credit within one group of companies which also includes insurance companies, often in collaboration with chains of real estate agents. Since solicitors recently lost their exclusive right to draw up legal documents, the integrated credit and insurance institutions can now handle the entire property market from contract note to final title deed, not to mention short- and long-term financing and insurance, including change-of-ownership insurance.

As the term indicates, professional advice is not a promise to provide a particular result, but to aim at the best possible result. A lawyer will not, of course, guarantee to win a case, only that there is a reasonable chance of winning. He can therefore only be held liable for bringing entirely baseless actions. He must of course be

²⁸ See also the Judgment *UfR* 1990:482 mentioned above, in which an energy consultant was found not to have breached the building regulations as all he had done was voice the view that no more requirements could “reasonably” be made of the energy certificate which must be prepared in connection with a house sale. *UfR* 2000:213 V stresses that the building expert was responsible for rot in the floor as, in his capacity as technical expert, he should have made a more thorough investigation; and *UfR* 2000:2505: the building expert was not responsible for rot in the roof construction as the expert, who was an architect, had carried out the inspection in accordance with the rules.

familiar with clear rules of law, although certain areas such as tax advice may require insight into and experience of the relevant conditions of life and the choice of potential strategies for tax minimisation. In an old judgment, a lawyer was held liable for damages because he had not prolonged the handling of a deceased estate past a certain date in the interest of gaining certain tax advantages, but the lawyer was later acquitted.²⁹ If lawyers and accountants provide direct advice on tax evasion, they become liable in relation to both the client and the tax authorities.³⁰

Lawyers can act in different capacities, and they do not incur professional liability when, for example, advising their clients on business or private matters unless they misinform the client on clear rules of law. The same presumably applies to a lawyer acting as a member of the board of a public company, where, presumably, his obligations under Section 140 of the Companies Act in relation to reckless decisions are the same as those of other board members unless he has agreed to act specifically as legal adviser in a particular instance.³¹

Traditionally, *banks* have not been held liable for credit advice given to the business sector unless the bank offers specific advice on security or provides wrong information on security.³² Neither are banks responsible for advising home buyers on forward cover insurance.³³ One bank was, however, found liable for the loss suffered by a client whose eye injury was not covered by the insurance company associated with the bank, although it would have been covered by the insurance offer he had shown the bank which had required proof of having ability-to-work cover as a condition of the client's obtaining a loan.

The cases which have attracted most attention are those involving mortgage-related losses. In some cases both *real estate agents* and lawyers have been held liable for errors in financing plans. One such type of case involves properties financed through non-convertible loans. The second type is those where the amortisation periods of fixed loans have been wrongly calculated, leading buyers to expect the mortgage to be fully paid over a shorter number of years.

In the former case there can be no doubt that both parties are liable, as they should have taken into consideration that the price of a house would fall with the fall in interest rates which commenced in the 1980s.³⁴

Opinions have differed, however, with regard to the second problem. There has been no controversy with regard to the grounds on which liability was established, but the concept of loss has been the subject of much debate in the cases revolving

²⁹ UfR 1985:489 H. See discussions at the 35th Nordic legal conference (Forhandlingerne ved Det 35. Nordiske Juristmötet) 1999, p. 443 (on the relationship between ethical and legal standards and the scope for avoiding liability).

³⁰ UfR 2000:365 H, otherwise not UfR 1997:842 H (accountant), but UfR 2001, No. 5 (valuation).

³¹ On lawyers' professional liability, see A. Vinding Kruse, *Advokatansvaret*, 6th ed. 1990, Sect. 7; Erik Werlauff, *Ligebehandling af bestyrelsesmedlemmer*, UfR 1998 B 13; UfR 2000:133 H (negligent supervision of a bankrupt estate for which he was responsible, but acquitted because of lack of evidence of the reason for loss).

³² UfR 1999:1969 H; UfR 2000:2267 H (liability for defective safe custody declaration).

³³ UfR 1998:1215 V; UfR 2000:2210 H (not liable for loss on forward exchange transaction). *SKAT 2000*, p. 866 (not responsible for "asset stripping", i.e. sale of empty company with tax debt, as the bank was under no obligation to have checked the purpose of the loan).

³⁴ UfR 1997:1337 H and 1582 Ø.

around the term to maturity of a loan. If the real estate agent, the solicitor or the bank should overlook a prior mortgage, so that the proceeds from the re-mortgaging in connection with a sale are less than the seller was advised, all the professions involved will of course be responsible. But what happens if the situation is such that no actual “loss” was suffered, as the client will receive the promised proceeds, although he must pay off the loan over a longer period than advised? In a test case, the Supreme Court dismissed a claim against a bank for reduction of the stipulated number of payment terms on the grounds that no loss had been suffered.³⁵ The banks’ own complaints board had ordered the bank to reduce the balance of the loan.

One factor to have influenced these contradictory results is the fact that real estate agents are responsible for faulty financing plans.³⁶ From this, the complaints board drew the analogous conclusion, while the Supreme Court concluded conversely, although this places the banks and lawyers in a more favourable position than real estate agents, whose profession is presumed to occupy a “lower” rung on the scale of professions.

The case led to an “advisory committee” being established. In a minority report,³⁷ the committee recommended a liability rule on financial advice given by accountants, banks, insurance companies, credit institutions, lawyers, real estate agents and other commercial providers of investment services under which rule such providers can be forced to pay a sum in “compensation for disappointed financial expectations” in addition to compensation for actual losses. The recommendation has been criticised by experts on various grounds. Some find that “term-to-maturity” cases should not incur compensation or damages.³⁸ Others stress the contractual element and consider the bank’s statements on its computations to be an erroneous declaration of intent, the content of which, under Section 32 of the Act on Contracts, can be claimed against the bank by an opposite party acting in good faith.³⁹

3.5 *Liability for Prospectuses*

One of the most hotly debated issues in the area is the so-called prospectus liability, i.e. liability for false or misleading information given in connection with share subscriptions in new or old companies.

The question concerns both the company and its governing bodies: management, board, shareholders and assisting banks,⁴⁰ accountants and lawyers. It has been

³⁵ UfR 1996:200.

³⁶ Section 24.2, 2 of the Act on Land and Property.

³⁷ *Rådgiveransvar*, Betænkning No. 1362, 1998.

³⁸ Lennart Lyngge Andersen and Peter Møgelvang-Hansen, *Bankretlige emner*, 1994, Chapter 10.

³⁹ Stig Jørgensen, *Hybrider*, Ånd og rett. Festskrift til Birger S. Lassen, 1997, p. 519.

⁴⁰ Supreme Court Judgment, UfR 2000:2176, imposed liability for damages on the lead bank for price loss caused by misleading information in the Notice to the Stock Exchange on full subscription of the share capital, although only 1/3 of it had been subscribed for, thus causing the price to drop. On the other hand, in UfR 2000, No. 50, the Supreme Court dismissed a compensation claim against the issuing bank for losses incurred by the buyer of “non-convertible bonds” when the issuing company went bankrupt. This was despite the fact that the bank’s own

much discussed, not least in Swedish theory and practice, since the well-known Kreuger case in 1935, which ended with the company being acquitted of liability out of consideration for the company's creditors. The question has also been discussed in other contexts, especially as a matter of contract law, either as invalidity on the grounds of wrong information under the Act on Contracts, namely Section 30 (fraud), Section 32 (lack of agreement between intent and statement) and now also Section 36 on unfair contract terms or on the grounds of *culpa in contrahendo* (reliance damages).

Swedish law has presented the particular problem that “*general pecuniary loss*”, i.e. damage which does not involve personal injury or material damage, may normally only be claimed in cases involving special authorisation (or a criminal offence), while Danish law has never had this restriction.⁴¹ On the contrary, under Danish law⁴², as mentioned above, professional negligence has been seen as a combined contracts and torts concept which could be claimed by both contractual and third parties.

Danish courts have not, therefore, had the same difficulties in establishing the liability of share issuers for misleading information in a public prospectus as Swedish courts (*UfR* 1993:126 H.⁴³) In another case (*UfR* 1989:241 H), the sale of a mortgage was cancelled because of misleading information, but the lawyer who had assisted in the transaction was acquitted from lack of evidence that he knew about it (minority opinion). In a third case (*UfR* 1994:876), the issuers of a share project and the issuing bank were acquitted as the information was not blatantly wrong. The accountant was also acquitted. As in Swedish law, there has been doubt as to whether the acquittal could be claimed against the company's creditors. A former judgment said no (*UfR* 1981:887), but this judgment has been the object of considerable criticism.⁴⁴

Although these judgments are generally based on the rules of contract law, they could also be based on the law of torts (cf. *UfR* 1993:696), which ordered the financing bank to accept the cancellation, albeit on the basis of the rules on assignment of claims, as the assignee is not normally placed in a better position than the assignor (Section 27 of the Instruments of Debt Act), but the issuing bank could have been judged under the rules of tort, as were the lawyers and the accountants (who were acquitted of professional negligence as, on quite specific grounds, they had not departed from their professional ethics.

experts had expressed criticism, but the Court stressed the fact that the company's accountants had endorsed the accounts.

⁴¹ Jan Kleineman, *Ren förmögenhetsskada*, 1987; Per Samuelsson, *Information och ansvar*, 1991; see also Carl Johan Deuschel, *Bolagets ansvar vid fel eller brist i prospect*, *Juridisk Tidskrift*, 1999-2000, p. 269.

⁴² Stig Jørgensen, *Professionsansvar*, *Juristen* 1967, p. 425; Morten Samuelsson, *Rådgiveransvaret*, 1993; Henry Ussing, *Erstatningsret*, 1947, Sections 5-6; Gomard, *Erstatningsansvaret i og uden for kontraktsforhold*, l.c. Note 11.

⁴³ Subscription documents on a limited company concerning a ship were incomplete and misleading, but access to cancel had been lost by effluxion of time (five years); see also *UfR* 1993:696 H and comments in *UfR* 1994:263 (no effluxion of time in this case) and *UfR* 2001.398 ff.

⁴⁴ See above *UfR* 1993 B 263.

4 Reflections

The above discussion of the definition and history of “professional negligence” gives occasion for some general reflections. The problems involved have been the object of the European Commission’s attention in two mutually related regards. One is the link to *product liability*, which has been made the object of harmonised European legislation. The other is the Community proposal on *services liability*. These are also problems which have changed in step with general social developments, and thus with the rules of contract and the rules of contractual damages. The twentieth century was marked by technological developments which accelerated during the second half of the nineteenth century.

At the start of the 20th century, Scandinavian obligation law was characterised by a tendency to objectify the issue on the basis that it was in the interest of turnover to ensure that a contractual partner acting in good faith had his just expectations fulfilled, and that contractual liability was extended to ensure that buyers of fungible goods could rely on having a claim for compensation not only in cases where the seller had guaranteed special terms or when he acted fraudulently, but also in cases where he had no reason to expect, at the moment the breach was committed, that the breach was within the control of the debtor.

In the interest of the increasing technological development, vicarious liability and accident insurance for employees were introduced into tort as early as the 1890s; and early in the twentieth century, Henry Ussing presented a theoretical argument in favour of strict liability for “dangerous operations”⁴⁵ but as mentioned, statute law and case law chose not to go that far, although the legal requirements regarding duty of care were extended considerably (cf. above). The courts imposed stricter requirements on services and products, broadly combining contractual and non-contractual liability, including the right of third party to bring action for damages. The contractual element became an important element in defining the obligations to the world at large (means of transport to passengers and third parties, product liability). Consumer protection became a dominant factor in post-war law-making.

In step with the increasing demands for formal qualifications, the term “profession” expanded to include not only certain “liberal” professions such as doctors, lawyers, architects and others, but also an increasing number of functions which can actually be performed by various professions, such as building reports and the provision of financial advice in the broad sense. It is difficult to see from the application of the law whether the deciding factor is the profession or the function. To this should be added the fact that new groups of medium-length vocational courses, including those for nurses, real estate agents, authorised electricians and other technicians, are gradually being subjected to “professional standards”, i.e. to increased liability in negligence in parallel with the general extension of fault liability in the private sector.

We are actually approaching the state proposed by the European Commission in its draft legislation in which there is general liability for services, at least in commercial relations, excluding only actions and services performed in the course

⁴⁵ Henry Ussing, *Skyld og Skade*, 1914.

of private or leisure activities, unless the actions or services involved arose out of commercial relations, such as entertainment and similar, while liability in relation to sports or leisure activities is restricted.⁴⁶

In Danish and Nordic case law, liability of service providers has been treated as an extension of contractual liability. Even so, we have seen⁴⁷ the Danish Supreme Court deal with these cases on the basis of the law of damages in the sense that stress has been placed on the existence of a formal “loss” rather than on the client’s “expectations”. During the same period, in the cases involving stock exchange prospectuses, the question of defect has been decided with reference to the rules of contract law on fraud and misinformation, leaving out all discussion of doctrines under the law of damages other than *culpa in contrahendo*.

In the view of the present author, an attempt should be made to clarify the alternative or cumulative application of rules in order to establish a choice in favour of the person to whom the service is owed. Under Section 42 of the Sale of Goods Act, a guarantee need not be explicit (must be deemed to be guaranteed), and under Section 5 of the Product Liability Act, “marketing” is an important component for the definition of a defect. To a large extent, the courts have deemed wrong labels and faulty descriptions of, or faulty user guides to, a product to be enough to make the product “defective”, and they have consequently imposed strict liability (Section 1).

Any work on consultancy liability should be discussed in the context of professional liability, which issue should be taken up for discussion in connection with the hearing of the European draft proposal on liability for service providers in general.

It is not uncommon in association law for persons to have several functions, e.g. when a person is both manager of a company and owner of a firm, and single persons can perform a number of functions or may be assigned various roles by other people. In cases such as these, the courts have taken into consideration the justified expectations of other people in their interpretation of particular situations.⁴⁸

In the modern world of finance, where a number of functions have accumulated through major mergers among financial institutions, it is becoming increasingly common for the same persons to perform a string of different but related operations. Quite apart from the problem of impartiality, in cases where the adviser is fully or partly remunerated on the basis of his performance, the function must be the deciding issue in the consumer’s (client’s) expectations of the advice, whether legal, financial, insurance or technical. It is not acceptable, for example, for the institution to attempt to circumvent a legal professional standard by letting a non-legal bank employee perform legal work, as is now possible. It is equally irrelevant in the assessment of building reports whether the inspector in question has a technical or other professional background.

We are what we do!

⁴⁶ Bertil Bengtsson, *Skadestånd vid lek, sport och sällskapsliv*, 1962.

⁴⁷ UfR 1996:200 (the term-to-maturity case).

⁴⁸ Stig Jørgensen, *Fuldmagtsproblemer*, *Juristen* 1968, p. 401.