

Adviser's Liability in Connection with a Duty to Inform – a Problem Inventory

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The paper discusses the development of law in recent years in the area of adviser's liability for damages. The author presents the problems which become relevant in connection with the provision of advisory services due to the peculiar nature of the duty to inform. Special attention is given to court practice, and the presentation ends with a warning not to allow liability to become too extensive.

1 Introduction

Not even those whose interest in following changes in case law is limited can have missed a flow of court cases appearing before the courts in recent years, concerning so called adviser's liability. The decisions in these cases have made a clear mark on the Supreme Court's collection of precedents. In addition, it is difficult to establish a decisive factor which has made these cases become so common, and in which the precedents are only the top of the iceberg.

To be sure, immaterial services have become an important area within the service sector, and the ever increasing complexity of the assignments' character has contributed to the fact that issues of liability, which were previously of little consequence, have now become pertinent. Even such factors as that consultants in a position of trust must expect to have their services examined have contributed thereto. Also foreign impulses, especially from the United States, have certainly contributed to this tendency. Swedish legal literature has shown until now a limited interest in the topic,¹ but Danish literature has had a richer tradition in this respect for a long time now.²

¹ See, however, Heuman, *Advokatens rättsutredningar – metod och ansvar*, 1987.

² See, e.g., Morten Samuelsson and Kjeld Søgaaard, *Rådgivaransvaret*, 1993. Special studies include, for example, Vinding Kruse, *Advokatansvaret*, 6th ed., 1990, and Ulrik Gorm Møller, *Skatterådgivning*, 1996.

2 The Meaning of Adviser's Liability

Without actually falling into any kind of conceptual jurisprudence, it can be, however, worthwhile to try to establish what is actually meant by the term *adviser's liability*.³ Despite the fact that the Act on the Prohibition of Professional Advice in certain Cases now provides a written definition of adviser's liability, the definition does not provide an obvious starting point.⁴

The Supreme Court declared in NJA 1995, p. 505 (NJA – the Supreme Court Reports) that in the preparatory materials for section 2, subsection one of the above-mentioned Act it is stated that the concept of consultancy includes not only advice in the sense that a certain mode of action is recommended, but it also embraces concrete measures in order to implement a given recommendation.⁵ A report of the Council on Legislation mentions as examples of the above assistance in company formation, accountancy, foreign currency transactions and tax planning. It should be remembered that the Act in question focuses only on advice 'in legal or economic affairs'.

In actual fact there are a number of different *consultants* who provide advisory services, and separating the latter from other consultancy activities is not such a straightforward task. In certain types of services the main object might be something else than giving advice, such as, for example, performance of some purely physical activity. When a product is supplied, the product itself may be defective, or questions of product liability may arise.

As can be seen from the well-known 'Dill case' (NJA 1968, p. 285⁶) wrong recommendations constitute a special problem within the area of product liability. It may seem more risky, however, to interpret errors committed at the time of the conclusion of a will, or mistakes contained in printed documents as a product liability problem if one has been misled by the information, for example.

The most common case of adviser's liability becoming operative is the case in which someone has been negligently misled by the information supplied, and the most common type of damage is pure financial loss.⁷ That does not mean that a mistake committed when making a will, for example, cannot be considered as a case in which adviser's liability becomes effective, despite the fact that nobody has really suffered any loss by relying on the will's contents.⁸

Another important context in which adviser's liability becomes applicable is the professional context. Non-professional advice is usually free from liability.

³ Refer, in general, to the older literature: Hasselrot, *Några Spörsmål ang. tjänstelega*, Malmö 1926, p. 176; regarding more recent literature: Bengtsson, *Särskilda avtalstyper I*, 1971, p. 172 ff. See also Hellner, *Speciell avtalsrätt II, Kontraktetsrätt*, 2nd Booklet in *Allmänna ämnen*, 2nd ed. 1993, p. 193 ff.

⁴ SFS 1985:354 (SFS = the Swedish Code of Statutes).

⁵ Cf. Wennberg, Suzanne, *La Reinemålet och ansvar enligt rådgivarlagen*, JT 1995-96, p. 840 ff.

⁶ See Bengtsson in *Rättsfall att minnas* 1997, p. 179 ff., and Bengtsson in SvJT 1969, p. 46 ff.

⁷ See Kleineman, *Ren förmögenhetsskada. Särskilt vid vilseledande av annan än kontraktspart*, 1998.

⁸ See NJA 1939, p. 374.

In American law one often speaks of so called 'curbstone-advice',⁹ i.e. advice given within a sphere in which nobody becomes liable even though the information has been given in a very careless way. In such cases one usually says that the situation in which the advice was given was such that the misled person had no reason to rely on it, and the adviser is therefore immune to liability for damages. If he relied on the 'advice' he took a risk and must therefore suffer its consequences.

It is not easy to specify, however, the exact point at which a border line has been crossed for liability to apply. Sometimes it is claimed that for liability to arise a contract agreement entailing advisory services shall have been concluded between the misled person and the wrongdoer. Such an approach may appear, however, much too rigid. Most professional advice is not preceded by any formal agreements¹⁰. Personally, I tend to regard the standpoint chosen by the Supreme Court in NJA 1992 p. 243 as a suitable starting point for considering a person to have acted as an adviser. The Supreme Court delivered the following statement:

"It is clear that Anna-Stina H perceived Yngve L as her financial adviser in the matter concerning the business transaction. She had good reasons to form this opinion, considering Yngve L's many years' involvement in the company as an auditor and as an assistant in connection with the family's tax returns... It could not have escaped Yngve L – who in no way indicated a different point of view – that Anna-Stina H, who, as has been shown by the investigation, was not assisted by anyone else, regarded Yngve L as her financial adviser in the securities transaction. In this situation a contractual relationship between Anna-Stina H and Yngve L must be considered to have arisen."¹¹

Already in the initial question concerning the moment at which a contractual relationship is considered to have arisen the decisive component of almost every type of adviser's liability can be discerned: it is ultimately a question of the relevance of one's justifiable reliance on somebody.¹²

If somebody had a reason to rely on the information supplied by a person acting in his professional capacity, there is good reason to view the responsibility of the information supplier stringently, especially if the information supplier realised, or should have realised, that the recipient of the information would rely on the information received. The fact that one's conduct may be relevant in connection with other forms of contract conclusion than those in which the provision of advisory services is involved can be seen from a discussion on so called 'authorisation by way of tolerance and conduct'.¹³

⁹ See Kleineman, loc. cit., p. 388.

¹⁰ Cf. Bengtsson *Särskilda avtalstyper I*, p. 173, and SOU 1958:43, p. 61.

¹¹ [Translator's note: all the quotations are translations from the original in Swedish].

¹² Cf. Kleineman, loc. cit. p. 466 ff.

¹³ See, Grönfors, *Ställningsfullmakt och bulvanskap* 1961, p. 244, and Håstad, *Reform av de nordiska avtalslagarna* in 'Förhandlingarna på det 32 nordiska juristmötet', 1990, p. 274.

3 Subjective Prerequisites for Liability

Normally, adviser's liability should be based on the assumption that the adviser has been guilty of negligent conduct. It must be considered as unusual for a professional adviser to guarantee the outcome of his advice.¹⁴ Even if an expression chosen by the adviser should give an impression that a guarantee has been given, it should preferably be taken as an indication that the adviser's way of expressing himself was intended to signal that the advice seeker could rely on the information more than is usually the case. It is thus an indication that the evaluation of negligence will be more stringent, if anything.

Should an adviser be so rash, on the other hand, as to guarantee a certain state of affairs or a taxation result, which proves later on to diverge from the real conditions, the adviser's liability must be considered as strict.¹⁵ It should be kept in mind, however, that even in the event of strict liability for damages, the requirement of adequate causality must be satisfied for liability to arise. In the event of a guarantee concerning a taxation result the argument is based, however, not on the principles of the law of damages but on the principle of the declaration of intentions, in which case the guarantee applies irrespective of whether the tax payer has been able to undertake any other measures in order to limit his liability.

4 The Peculiar Character of the Duty to Inform

If we try to analyse more closely the question of negligence as regards adviser's liability, we will soon face the problem which I have chosen to refer to as 'the pedagogical duty'. This duty entails that it is reasonable to require that an advisor had the ability to explain the problem in question to the seeker of the advice in a way that can be assumed to be comprehensible to the latter.

A typical example of this problem is illustrated in NJA 1994, p. 532, in which a consultant had performed certain tests, for a certain sum of money, testing the degree of resistance to light of a certain material. The consultant was held liable for damages despite the fact that the consultancy assignment had been performed faultlessly, due to the fact that he had supplied information concerning a certain classification scale which was incomplete, and which was therefore likely to lead to a misunderstanding.

An adviser, or as in the case of NJA 1994, p. 532 an information supplier, can incur liability for negligent deceptive conduct despite the fact that he has acted

¹⁴ This was, however, the opinion of the Stockholm City Court in a much discussed judgement concerning liability of auditors acting as tax advisers, 1995-11-30 (DT 1134). The Court of Appeal arrived, however, at another conclusion in this matter. It stated, among other things, that 'it has been shown in the case that the customary practices of tax advisers do not include guarantees as to a certain tax result. This situation must be regarded as natural, since the state of the law in the area is sometimes complicated, and interpretation of tax legislation uncertain.' See Svea hovrätts dom 1997-06-06 in T 11/96, p. 10.

¹⁵ On top of it all, such a person will also lack insurance protection, since liability insurance for pure financial loss does not normally cover losses caused by guarantee offers.

truthfully. An adviser must therefore possess a kind of pedagogical power of insight, so that he can discern what the information receiver may successfully assimilate, and supply the information in such a way that it corresponds to the information receiver's ability to interpret the information correctly.

This problem became relevant in NJA 1995, p. 693. In this case a broker avoided liability for damages despite the fact that he had not supplied the information which the customer would normally need in order to trade with so called 'derivative instruments'. The Supreme Court stated that in connection with such trading

“a broker must make sure that a customer fully realises what risks are connected with issuing options.”

Even though the broker failed to do so in the case at hand he was not held liable for damages, since, taking into consideration what he knew about the customer, he had reason to

“believe that Conny H was sufficiently aware of the special risks connected with index options trading”.

It was therefore considered that the broker could not be regarded as not having been conscientious enough by reason of his failing to inform the customer about the risks. In this case the adviser had been clearly guilty of a mistake. Despite that he was exempted from liability due to the fact that the customer had not been misled by the mistakes of the adviser. The situation in this case is almost the reverse of the one in NJA 1994, p. 532.

The 'pedagogical duty' has a particularly important status especially when it is the question of legal advice concerning preparations for business arrangements. The obligation to inform about risks is a recurrent duty frequently neglected by advisers.

An equally important question with regard to adviser's liability concerns the content of the so called *procedural liability*. This is connected with the fact that it is often difficult to perform causal assessment concerning persons acting in their professional capacity.¹⁶ First of all one must try to establish the norm which has been ignored by the professional in order to be able to decide if he has neglected it to such an extent that the discrepancy can be regarded as negligent. For many professions there are professional principles to be followed. Regarding lawyers the concept of good advocate mores¹⁷ is applicable, and in relation to accountants the code of professional ethics for accountants is a well-known concept.¹⁸

¹⁶ See Heuman, loc. cit. p. 57 ff.

¹⁷ See Wiklund, *God advokatsed*, 1993.

¹⁸ The latter concept must not be mixed up with the concepts of generally accepted accounting principles or generally accepted auditing standards. It has been claimed, however, that the Supreme Court might have made this very mistake in NJA 1996, p. 224. See in this connection Pehrson, *Omfattande ansvar för bolagsrevisorer*, JT 1996-97, p. 133 ff.; Gometz, *HD vidgar revisorns skadeståndsansvar*, JT 1996-97, p. 214 ff.; and Leffler, *Om gråsparvar*

The question of how to perform the analysis concerning the question of whether procedural liability has been violated is clearly illustrated in NJA 1987, p. 692. In certain types of advisory services the question of whether procedural liability has been violated or not is after all a particularly difficult question to answer. This is especially so with regard to the kind of advice which is more subjective in character than other types. Here a broker's investment advice can be mentioned, or a valuer's estimate of the value of a certain property. In the latter case the following has been stated by the Supreme Court in NJA 1987, p. 692:

“When evaluating properties, it is hardly possible to arrive at a value which will be equally high, irrespective of the valuer who has performed the evaluation. Evaluation of real property is after all dependent on the valuer's view of the market and the property in question. One must therefore leave considerable scope for the valuer's own assessment. A considerable discrepancy between the valuer's assessment and what later appears to be the real value of the property must therefore be permitted, without the valuer becoming regarded as having acted negligently. In the present case the question does not concern, however, an error of estimate, but an incorrect and deceptive statement concerning a factual circumstance, namely, the possibilities of exploitation for the construction of houses.”

It is therefore not the making of a more or less correct subjective assessment of the value which gives rise to liability for damages, but rather failing to make investigations or enquiries which can reasonably be required of a given professional.

A comparison can be made here with a lawyer. A lawyer can become liable for damages by giving incorrect information concerning applicable law. On the other hand, one cannot demand that a general practice lawyer shall possess thorough knowledge of, for example, case law. This can be illustrated by the classical court case NJA 1957, p. 621, in which the Supreme Court chose to uphold the decision of the district court, containing, among other things, the following invaluable reasons for the decision:

“The statute does not clearly indicate that the preferential right ceases to exist when the company moves to a different address, and the 1904 decision of the Supreme Court, in which this principle was established, was not mentioned in the 1952 edition of the Act. Despite this, if H. had given the question appropriate attention, he could have gained sufficient knowledge concerning the matter, because, among other things, as Gyllin has pointed out, the matter has been discussed in Östen Undén's work 'svensk sakrätt' published in 1927 and well-known among lawyers.”

The Supreme Court's reasoning provides in this case certain guidelines for procedural liability in general, but it is, however, much more difficult to establish *liability of specialists*. There is good reason to believe that such

och revisorers ansvar – några synpunkter på NJA 1996, p. 224. See generally regarding the position of auditors, Moberg, *Bolagsrevisorn. Oberoende ansvar sekretess*, 1986.

liability is significantly stricter than in non-specialist cases. This is corroborated by NJA 1981, p. 1091.¹⁹

Generally speaking, the question of the stringency of liability seems to be determined according to the same criteria as other questions. If a customer wishes to receive a quick evaluation, being aware that the issue requires a more thorough analysis for which there is no time, and the adviser has explained to him this state of affairs, it seems to me that such a *risk analysis* should be sufficient to limit the adviser's liability in that situation. Another, and a more complicated issue, is the fact that it is up to the adviser to secure evidence concerning this situation.

The obligation to provide *risk analyses* is a recurring feature of more recent judicial decisions concerning adviser's liability. The Supreme Court demonstrated a particularly stringent view regarding an inspector's liability in NJA 1997, p. 65.²⁰ In this case an inspector pointed out during the inspection of a real property purchase that there were no air holes in the roof board necessary for the ventilation of the roofing. The inspection report showed that this should be remedied, but the inspector did not particularly point out the fact that if no remedy was provided there was a risk of damage by putrefaction. The Supreme Court upheld the decision of the Court of Appeal which showed that the inspector had not supplied information to the property purchasers sufficient for them to understand the risk entailed by the roof construction.

The minority of the Supreme Court (two Justices) claimed, on the other hand, that the inspection report was formulated in such a way that it did not leave any scope for misunderstanding, and that the inspector must have therefore been justified in his assumption that 'if, despite that, the purchasers had any doubt about the content of his report, they would approach him with relevant questions'.

The severe assessment of the majority means that advisers will have to satisfy stringent requirements. It will thus be part of the 'pedagogical duty' of an adviser to make sure that the customer has really understood the content of the advice given by the adviser. It will also be up to the adviser to secure evidence that this has been the case.

Sometimes the Supreme Court has been a little less stringent in its assessment. In NJA 1994, p. 598, concerning liability of a bank acting as a tax adviser one can find an example of a less stringent attitude. The case concerned an owner of a company who, following the advice of a bank, has carried out certain transactions in order to avoid tax on his capital gains. The transaction was not approved, however, on the basis of the provisions of the Act on Tax Evasion. The legal assessment made by the bank 'was to a certain extent founded' at the time of the advice, but proved itself untenable in view of later case law.

The bank was criticised by the Supreme Court, since it should have realised 'that the assessment given by it was very uncertain'. Subsequently, the Supreme

¹⁹ Cf. Heuman, loc. cit. p. 88 f.

²⁰ Cf. Kleineman, *Vidgat rådgivaransvar* in JT 1996-97, p. 1003 ff.

Court formulated a noteworthy, fundamental principle to be used in the analysis of 'complicated questions':

"Generally speaking, it is required that a person giving advice on complicated legal issues shall draw the assignee's attention to the fact that there is no precedent for a given issue, or that the status of the law is for some reason uncertain. The need for such information must be, however, dependent on who the assignee is, what qualifications he has, and whether he is already cognisant of the problem. There may be cases in which it is obvious that the state of the law is so uncertain that any special comments concerning this matter may be regarded as superfluous."

The bank was, however, lucky. The owner of the company had participated several months before in a meeting at which the bank gave an account of the services offered by it. The bank's taxation lawyer delivered a talk in which he showed, among other things, an over-head picture listing the requirements included in the general clause on tax evasion. The company owner was therefore considered to have received information concerning the matter, which is why he could not have been unaware that the transaction conducted by him a few months later, entailed 'certain risks'. The bank was therefore not found to be negligent.

The Supreme Court also stated in NJA 1992, p. 502, that a tax adviser cannot either be blamed for refraining from recommending 'solutions which are complicated in their construction or difficult to assess from the point of view of taxation law'. In this case an action was instituted against an auditor, the issue being quite different, however, from the one in NJA 1994, p. 598. Here it is not the failure to explain the risks, but the question whether failure to recommend risky transactions is to be considered as negligent *per se*, as, for example, if the customer could have saved a lot of money if he had been given such advice.

5 The Professional Groups Concerned

The professional group which has been most affected by adviser's liability internationally²¹ are *auditors*. This situation corresponds well to Swedish judicial practice. Auditors are partly liable under Chapter 15, section 3 of the Swedish Companies Act, and partly as advisers - especially those who have chosen to provide taxation advice due to their competence in the field of economy and finance. The latter is a particularly liability-generating form of advice.

Tax consultants are often *lawyers* or *economists* by profession, on the other hand. In general, legal advice does not seem to be particularly liability-generating.²² I have been informed by insurance experts, however, that failure to

²¹ See Jackson & Powell, *On Professional Negligence*, 4th ed., London 1997, and Dugdale & Santon, *Professional Negligence*, 2nd ed., 1989.

²² A subject that company lawyers must pay special attention to is liability for so called 'due-diligence evaluations' in connection with transfer of undertakings or acquisition of shares.

observe various limitation periods may often lead to a claim for damages against lawyers. Judicial practice shows, in general, that *estate agents* and *stockbrokers* find increasingly often that claims are directed against them. Even insurance agents have come into focus, following the NJA 1992, p. 783 decision.

Other professional groups concerned include *valuers* and *inspectors*.²³ Here advisers are concerned whose information is used as a basis for different types of decisions, and where it is easy to claim that it was the incorrect information that has caused the damage.

A separate position is held by *banks* and *other professional creditors*.²⁴ Here professional liability of a very special character is involved. Banks come into contact with their customers in a number of different professional roles, even if the advisory role has gained particular prominence in the past few years.²⁵

Even though many citizens assume that banks have far-reaching responsibilities towards their customers in providing assistance to them, one must be careful when determining their advisory role.

In NJA 1996, p. 3, the question concerned the issue of whether a number of borrowers could evade their obligation to pay their loans. The reason for this was that these persons, in their capacity as employees of a company, had been granted credit by the bank in order to finance a purchase of convertible promissory notes. The bank paid out the amount of the loan directly to the company, but no convertible promissory notes were ever issued, and the company was subsequently declared bankrupt. The Supreme Court dismissed the borrowers' action and stated, *inter alia*, the following:

“Even if a bank normally learns about the purpose of the credit when granting it, there is no fundamental obligation for the bank to test the suitability of how the borrower intends to use the money. The main purpose of an investigation into credit eligibility is to establish whether the borrower is able to satisfy the conditions of the credit agreement, and whether his finances will allow him to discharge his credit obligations; no other obligation can be considered to follow from section 5 of the Consumer Credit Act.”

A bank – seen as an organisation – is, in principle, not obliged to persuade a customer not to perform a certain transaction, even if the bank happens to have sufficient knowledge to draw this conclusion. The extended duty of loyalty – *uberimae fides* – which is sometimes mentioned in connection with banks, does not embrace the customer's business decisions.

See Sara Kersby, *Due Dilligence – särskild om advokats ansvar vid dess genomförande* in JT 1997-98, p. 143 ff.

²³ Regarding general information concerning liability within this area from an international perspective, refer to: 'Holyoak & Allen, *Civil Liability for Defective Premises*, London 1982.

²⁴ See, for example, Blanchard (ed.), *Lender Liability*, Volume 1-3, 1994 (USA); Cranston (ed.) *Banks – Liability and Risk*, 2nd ed. 1995 (UK); as well as from the Danish perspective, Lyngé Andersen and Møgelvang-Hansen, *Bankretlige emner. Klager over pengeinstitutter* 1994, especially p. 203 ff.

²⁵ Cf. Kleineman, *Lender Liability – ett skadeståndsrättsligt perspektiv på 1990-talets finansiella kris*, JT 1992-93, p. 289 ff.

Consequently, no general advisory duty in relation to its client applies to a bank. What must be established is whether in a particular case an advisory situation or the like was applicable.

An area in which adviser's liability has not been directly discussed concerns the labour market. Both employer organisations' and trade union organisations' regulations frequently provide that they shall offer advice to their members. No guiding precedent exists, however, even though the question has been the subject of an arbitration decision. In Danish law²⁶ a decision which has attracted a lot of attention was delivered by the highest court of appeal (UfR 1991.903 H), in which a trade union became liable for the damage suffered by its member in connection with bad advice.

The problems in this area seem to be similar in many ways to the situation in the case of banks. The organisation does not assume any general advisory role – it has to decide instead whether the organisation has acted as an adviser in a given case. Trade union organisations especially face apparent problems. Often enough members of the organisation approach it for advice at a fairly 'low' competence level. There is therefore hardly any reason to treat the trust with which a member approaches its union organisation for advice in a different way than that when a bank customer asks the front-office staff for investment advice. Only in exceptional cases may the customer's reliance on such advice form the basis of liability. It is a completely different thing, however, if it is the bank which initiates something, for example, offering misleading information in a careless manner.

NJA 1996, p. 252, can be mentioned in this connection. Here the question concerned an employee of the creditor, who had supplied the contracting company with misleading information concerning the upper limit of the so called 'reserved amount'. The injured party – an entrepreneur who had made deliveries to a buyer of family houses - relying on the fact that a larger amount than the one fixed earlier on had been reserved for the entrepreneur on the client's account in the bank – put in a claim for the damage suffered by him after the customer had been declared bankrupt. The amount quoted by the bank which was supposed to have been 'reserved' for the entrepreneur was not there.

The Supreme Court pointed out in the reasons for the decision that the letter in which the bank erroneously described the scope concerning the upper limit of the reserved amount in question

“had been preceded by talks which the [entrepreneur] conducted first with [the client] and thereafter with [the bank's] office.... in order to secure an increase in the reserved amount so that it would also cover the value added tax.”

The Supreme Court declared that the entrepreneur had reason to perceive the letter from the bank “as notification of the fact that these efforts had been crowned with success and the reserved amount had been raised”

²⁶ See Morten Samuelsson and Kjeld Søgaaard, *Rådgiveransvaret. Erstatningsansvar og forskikring for professionelle rådgivere*, Rugnsted Kyst 1993, p. 276 ff.

The Supreme Court found that the letter was clear as regards its content and that it was written on the creditor company's letter paper, having been signed in [its] name. The entrepreneur had therefore no reason

“to doubt the information contained in the letter and make special enquiries regarding the background of this information or [the bank employee's] authority to speak on behalf of [the creditor]”.

It is important to note that the Supreme Court found that the damage caused by the bank to the entrepreneur was

“related to the law of obligations relationship between [the creditor] acting as a debtor and [the entrepreneur] acting as a creditor with regard to the reserved amount... .”

Despite the fact that describing the relationship between the bank and the entrepreneur as an advisory situation may seem somewhat far-fetched, the Supreme Court has especially emphasised the contractual character of the relationship.

The unexpected initiative of the bank employee to suddenly and of his own volition present the entrepreneur with the erroneous information gave rise to liability since, taking into consideration the background situation, the entrepreneur had reason to rely on the information. Despite the fact that the bank was not in any real advisory situation, it became liable for providing the information, since the information receiver had reason to rely on the information received from the bank.

Especially interesting is the Supreme Court's statement concerning the bank employee's *competence*. It is sometimes believed that rules which are normally applied in connection with someone's competence to enter into a contract should also apply to those who in their capacity as advisors carelessly deceive the persons seeking advice. As already discussed above in connection with NJA 1992, p. 243, a contractual relationship arises in the case of advisory services on the basis of the fundamental principles of trust, rather than on the basis of the principles of contract conclusion applicable in other situations. Since liability for misleading information may also arise on contractual grounds, without it being the question of advisory services as was the case in NJA 1996, p. 252, the question of competence becomes less important. The Supreme Court declared in the 1996 case that the decisive factor underlying the decision seems to have been a question of whether the information receiver should have made enquiries concerning the competence of the bank employee. The Court did not find it necessary.

6 Statutory Adviser's Liability

Two categories of agents assume a high degree of statutory adviser's liability. Both *estate agents* and *insurance brokers* have to put up with the fact that the

legislature has decided to regulate their liability by statute.²⁷ There is therefore reason to ask whether the norms established in the relevant statutes shall be regarded as a kind of *lex specialis*, or whether they shall be applied analogously to other agent categories, and whether they shall perhaps be even extended to other categories of advisers.

It appears difficult to give general answers to these two questions. Additionally, some provisions are so strange that they can hardly be used as the basis of analogy, whereas other provisions can be used for this purpose.

Under section 12 of the Estate Agents Act (SFS 1995:400) the estate agent shall perform 'the service for which he has been engaged with due care and in accordance with sound estate agency practice.' Furthermore, under the same provisions he shall 'safeguard the interests of both the seller and the buyer.' Furthermore, under section 16 the estate agent shall

"to the extent required by sound estate agency practice, provide the buyer and the seller with such advice and information as they may require concerning the property and other matters which are relevant to the sale. The agent shall strive to ensure that, prior to the sale, the seller provides such information with respect to the property as may be assumed to be of importance to the buyer, as well as to ensure that the buyer inspects the property prior to the sale or is afforded an opportunity to inspect the property."

Under section 18 of the Act, if the buyer is a consumer, the estate agent shall provide him with further information, including, among other things, a written calculation of the housing costs for the buyer. Under section 19 the estate agent shall:

"strive to enable the buyer and seller to reach agreement with respect to issues which must be resolved in conjunction with the sale."

Should the agent intentionally or negligently fail to fulfil his obligations pursuant to sections 11 – 19, he shall compensate the buyer or the seller for any damage suffered as a result thereof.

The agent must take the duty to serve two masters at the same time very seriously. The obligation to provide both the purchaser and the seller with 'such advice and information as they may require' cannot always be easy to comply with. This has been confirmed by two court cases showing that an estate agent's liability is truly strict. In NJA 1997, p. 127, (I and II) it was established that the estate agent was, in principle, liable to lay down the condition stipulating that the purchase would be valid only if a loan was granted, or if it could be taken over, since the buyer was dependent on the loan in order to pay the purchase price.

The agent was also found liable to inform the purchaser about the consequences of his not being able to satisfy the duty to pay the purchase price. Furthermore, the agent was obliged to 'advise the purchaser to apply for a loan, or for taking over a loan ... as a condition for the validity of the purchase.'

²⁷ See Gvt. Bill 1994/95:14, p. 39 ff. Cf. also Mats Broström, *Fastighetsmäklare – aktsamhetskrav och oaktsamhetsansvar vid fastighetsförmedling*, 1995.

The following statement was delivered by the Supreme Court in NJA 1997, p. 127, concerning this duty:

“Taking into consideration the gravity of economic consequences involved by the rejection of an application for a loan or for taking over a loan, an exception from this duty should be considered to apply only if the circumstances are such that a condition of the above-mentioned kind would not serve any real purpose.”

Such a case can apply if it appears ‘as practically impossible that the buyer would not be granted a loan or would not be able to take over an earlier loan’. The Supreme Court recommends also the following to the adviser:

“The condition concerning the granting or taking over of a loan should be formulated in such a way as to prevent the purchaser as far as possible from invoking the condition in order to avoid the purchase which he is unwilling to complete for other reasons.”

I have expressed some doubts in a different context regarding the agent's ability to follow the court's advice in this matter.²⁸ In view of bank secrecy and banks' apparent unwillingness to ‘force’ credits upon their clients, the purchaser should always have good possibilities of getting the bank to refuse him a loan under the pretext of economic problems. The discussed cases do not only invoke the agent's duty to advise his client to introduce a conditional clause, but also provide a good reason for the agent to secure evidence showing that he really has given such advice.

Similarly to the earlier discussed case concerning the careless inspector²⁹, the NJA 1997, p. 127 (I and II) case represents a new and stricter view of adviser's liability. It seems here that so called ‘consumer interests’ are placed especially in the foreground. Regarding commercial relationships the above-discussed judicial practice shows that a person speculating in options, or trying to make use of tax avoidance schemes, does not seem to have the right to place equally strict requirements on his advisors. Is there, perhaps, a moral factor present when deciding on a person's culpability?

Insurance agents' liability has also been regulated by the law.³⁰ Under section 13 of the Insurance Brokers Act the insurance broker shall:

“...identify the client's need for insurance and, when applicable, services connected with saving, and also propose suitable arrangements.”

The question of the insurance broker's liability has been driven to extremes in a complicated case concerning, among other things, the consequences of the fact that a fire insurance premium has not been paid in time. The Supreme Court declared that the insurance broker's assignment embraced ‘a general duty to advise and inform’.

²⁸ See, Kleineman, *Fastighetsmäklarens informationskyldighet*, JT 1997-98, p. 210 ff., esp. p. 216.

²⁹ See NJA 1997, p. 65.

³⁰ See The Insurance Brokers Act (1989:508).

It was thus the insurance broker's duty in the aforesaid case to 'ensure that the hotel companies received the information necessary for continuous insurance protection of the same kind as they had before'. The Supreme Court also stated in particular that it was the insurance broker's duty to ensure that the hotel companies were informed about the rules that had to be complied with as regards the question of premium payments in order to avoid the situation in which the insurance cover would expire. Due to his failure to inform the hotel companies about the terms and application of the premium payments the insurance broker had 'neglected his duty to provide the hotel companies with the information required by the insurance broker's assignment'.

The aforesaid court case indicates that the broker had a far-reaching duty to provide detailed information, and the question is what importance the very special circumstances of the case had for the stringency shown by the Supreme Court in its assessment of the broker's duty to inform. It seems to be still too early to evaluate the liability of insurance brokers. The NJA 1992, p. 782 case does not seem to constitute a sufficiently good basis for such an evaluation.

The fact that the legislature's stringency may sometimes clash with ethical norms transpires from the comparison between, on the one hand, section 16 of the Estate Agents Act, as compared to section 5 of the same Act, and section 42 of the Code of Conduct for Lawyers, on the other hand. A member of the Swedish Bar Association has the right to act as an estate agent, but he shall then not be registered with the Real Estate Agents Board. If a member of the Swedish Bar Association acts as an estate agent, under section 15 of the same Act he may not represent the buyer or the seller, and under section 16 he shall, 'to the extent required by sound estate agency practice provide the buyer and the seller with such advice and information as they may require...'. Under section 18 of the Code of Conduct for Lawyers, a lawyer shall be faithful and loyal to his client, and under section 42 he should:

“...draw the opposing party's attention to the fact that his assignment does not include the protection of the interests of the opposing party and advise the opposing party to retain or seek advice from another lawyer”.

The natural question here will thus be when a lawyer shall cease acting according to the Swedish Bar Association's rules, and start acting instead in accordance with the provisions of the Real Estate Agents Act.³¹ If the lawyer acts as a real estate agent on a regular basis, he should perhaps observe the provisions of the Act, but if he does that on a smaller scale, he should perhaps act as a representative instead. Surely it cannot be so that there is a direct conflict between his position according to the law as compared to the rules of the Code of Conduct for Lawyers?

³¹ Cf. Anna Hanberger, *Fastighetsmäklarlagen – en opartisk mellanman*, JT 1995-96, p. 560 ff., especially page 568.

7 The Requirement of Proximate Damage

Adviser's liability may awaken strong feelings. Often enough one encounters earnest discussions concerning the question of whether an adviser has been negligent, when at the same time a more difficult question has not been sufficiently penetrated, namely the question of whether the adviser's conduct has caused any damage at all.

This problem has been especially discussed in judicial practice regarding liability of tax advisers. The matter has been carried to an extreme for the first time in NJA 1991, p. 625. The question here concerned a real estate agent who had given wrong information concerning taxation of capital gains. The dispute in the case concerned the question of whether the person seeking advice had really suffered any financial loss as a result of the agent's negligence, and if so, how it should be estimated. The Supreme Court's majority made the following statement in this context:

“For wrong information concerning the possibilities of getting a respite from taxation of capital gains to result in the right to damages one should require, in principle, that the client must show that he would not have sold the property at the time he did had he received correct information.”

The person seeking advice had in this case satisfied this proof requirement and had therefore suffered financial loss. After that the majority made the following important pronouncement:

“In cases such as this it is generally impossible to establish with any certainty the resulting financial loss which can be affected by factors such as future property sales and changes in tax legislation, for example. If the estate agent's responsibility is not to be illusory and in conflict with the purpose of the legislation, the client cannot be encumbered with an obligation to prove concerning such uncertain factors lying in the future. The starting point for the assessment of the loss must be instead the fact that the agent has actually incurred costs for the client who would not have incurred them otherwise. The fact that such costs have been incurred must be proved by the client. If he has proved it, the loss must be considered to be equivalent to the costs, unless the agent can show that it is probable that the loss in the actual case will be smaller.”

It is thus a very important, but not quite straightforward, burden of proof rule which is proposed by the Supreme Court here. The rule crops up again in another case some time later. In NJA 1992, p. 58 an auditing company was found liable for damages due to careless advice which had led to taxation costs for two clients, which they would not have had otherwise.

The auditing company argued that the clients had not sustained any losses, since the tax advice given by the company was in reality advantageous to them. The Supreme Court stated that no definite evaluation ‘of the aggregate tax effect in connection with a transition to a trading company’ could be made. Among other things, one could not foresee other aspects than those from the sphere of tax law. The Supreme Court stated finally that:

“Following the statement of the Supreme Court in [NJA 1991, p. 625], loss assessment should start from the fact that the Mr. and Mrs. B had incurred taxation costs which they would not have incurred otherwise. The loss shall be regarded to be equivalent to the costs, unless [the auditing company] can show that it is probable that the loss is smaller.”

If we compare the ways of reasoning of the Supreme Court in this respect in NJA 1991, p. 625 and NJA 1992, p. 58 there is essential correspondence between them, even though there are differences too.

Bengtsson wonders whether these two cases express some general principle, or whether they can only be applied to the aforesaid type of loss.³²

In my opinion these cases are typical as regards tax advice. If a tax adviser gives wrong advice, stating that no tax or only a minor one will issue, and this proves to be incorrect later on, the adviser may have been negligent.

The prerequisite for liability for damages is normally, however, that the plaintiff must show that there was an alternative course of action which would have brought about the equivalent tax reduction. If, on the other hand, no such alternative course of action was open, even though the tax adviser must be considered to have committed an error and the client should be able to claim the repayment of the fee he had paid, this does not prove that it was the tax advice which had caused the loss. In order to do that an alternative way of conduct which the client should have chosen instead must be demonstrated.

On the other hand the tax adviser shall not be able to protect himself after the fact by demanding that the client shall enter into new, perhaps foolhardy, transactions in order to reduce the losses in this way. Neither shall he be allowed to argue that the losses could have been reduced by means of a number of subsequent transactions which the client actually failed to perform.

The conclusion is that it must be assumed to be the duty of the advice seeker to demonstrate that he has made arrangements relying on the careless advice, which have led to taxation costs which he would not have had otherwise. His loss shall then be regarded to be equivalent to these costs, unless the adviser can make it probable that the loss has been smaller. In NJA 1991, p. 625 the Supreme Court discusses in more detail some circumstances which must *not* be considered in the assessment of that case, however, whereas equivalent arguments are absent in NJA 1992, p. 58. This circumstance should hardly be interpreted in such a way, however, that in the 1992 case the Supreme Court had disregarded the argumentation presented in the 1991 case.

It seems that a claim stipulating, for example, that one could make fiscal adjustments of a loss incurred one year against a profit made in a subsequent year should not be acceptable as an argument that the taxation cost does not constitute a loss. One simply knows too little about the future conditions in order to be able to speculate about the way in which the injured party will be able to offset the present day's taxation costs.

If such speculations are to make sense at all, it seems that the negligent adviser will have to make it probable the very year in which the taxation cost arose that certain events are going to take place, enabling that the taxation cost

³² See SvJT 1993, p. 781.

will not constitute a 'final' loss. The presence of uncertain external factors, such as, for example, changed profits or new tax rules, as well as the effect of regulations outside the tax system, entail that it is not very probable that the negligent tax adviser will be able to diminish his responsibility this way.

8 Adviser's Liability Against Third Parties

There are good grounds to challenge the view that 'adviser's liability' may apply to a third party. The advisory function seems to presuppose that there has been some form of a contractual relationship. It is another thing that such a contract or assignment may arise quite easily.³³ On the other hand the study already performed shows that the boundary between adviser's liability and liability for other information supply is fairly diffuse.³⁴ It is therefore more a question of opinion whether one chooses to speak of adviser's liability in respect of a third party or liability for misleading information in respect of the same person.

It is a well-known fact that the liability provisions of Chapter 2, section 4 of the Tort Liability Act do not constitute any obstacle to the imposition of liability for damages in respect of a third party. The Supreme Court has decided, for example, that both a valuer can be liable to a third party (NJA 1987, p. 692) as well as an official receiver (NJA 1996, p. 700).

In NJA 1987, p. 692, liability was imposed on a valuer for providing careless and misleading information to a third party. While the county court and the court of appeal described the relationship between the tortfeasor and the plaintiff in contractual terms, the Supreme Court seems to have refrained from such conceptual definitions. The Supreme Court stated the following regarding this matter:

"Making general pronouncements regarding the borderlines of a valuer's liability for damages is hardly possible. The subsequent considerations concern only valuation certificates, or, as they are also referred to, valuation reports or valuation records, regarding real property, submitted by a person who accepts assignments concerning valuation of such property in his professional capacity. Such certificates are usually used as a basis for decisions concerning legal dispositions of real property, especially with regard to purchasing and mortgaging. The person commissioning the assignment may be the owner of the property, a lender, or a prospective buyer. It must be clear to the valuer that the certificate may be used for different purposes and by different persons. It is unavoidable that other persons than the assignee will pay attention to a valuation certificate. A system in which the issuer of a certificate is responsible only to the assignee creates ambiguous value judgments, without any real advantages for the real property or credit markets."

³³ Cf. NJA 1992, p. 243.

³⁴ Cf. NJA 1996, p. 252.

The Supreme Court has therefore come to the following important conclusion:

“There are overwhelming reasons supporting the view that the person who has justifiably placed his confidence in a valuation certificate shall not suffer the consequences of a loss which depends ultimately on the fact that the certificate issuer has acted negligently. Liability for damages regarding a person who performs valuation of real property in his professional capacity should not be therefore, as a rule, limited to loss sustained by the assignee, but it should also embrace loss sustained by a third party, unless a reservation concerning exemption from such liability has been made in the certificate.”

The above quotations show that the Supreme Court has accepted a fundamental theory or general principle concerning liability of persons acting in their professional capacity in respect of third parties.³⁵ This principle is based on the premise that professional liability may be imposed even in non-contractual relationships.

This principle is based – as is often the case in this area – on the argument of trust: it is only if the third party belongs to the circle of persons who had a reason to place their trust in this information when liability arises. Actual trust is thus required – which is a fundamental adequacy requirement – but, in addition, a legal-political value judgement is necessary too, or, to put it differently, an assessment of goal-oriented coverage³⁶, which entails that the trust can be regarded as justified.

In addition it is required that the tortfeasor shall have realised, or ought to have realised, that as a result of his tortious act the actual loss, or in any case a loss of this kind, might arise. The contract-like element of the liability relationship can be discerned here, due to the fact that a kind of demarcation principle is applied in such situations, which brings to mind similarities to the rule which can be found in Article 74 of the International Sales of Goods Act, notwithstanding that there is no point in time for the conclusion of the contract to fall back upon.

Despite the fact that the Supreme Court has chosen in this case to proceed from an accepted legal principle from the point of view of a comparative outlook, examples can be found of cases in which one has chosen instead to extend third party liability on the basis of analogy with an express statutory provision.

Quite a fresh example of the latter, rather controversial method can be found in NJA 1996, p. 224. In this case an auditor was found liable for damages under Chapter 15, section 2 of the Swedish Companies Act, as compared to section 1 of the same Act, in relation to a bank, by having participated in misleading valuation in a company in which he had earlier worked as an auditor. Owing to this he was deemed to have acted contrary to the generally accepted auditing standards. He had also participated in the preparation of a ‘balance sheet’ which was presented by him at a meeting with the bank concerning credits.

³⁵ Cf. Kleineman, *Ren förmögenhetsskada. Särskilt vid vilseledande av annan än kontraktspart*, Stockholm, 1987, p. 421 ff.

³⁶ Cf. Håkan Andersson, *Skyddsändamål och adekvans*, 1993, p. 452 ff.

The following statement was made by the Supreme Court regarding the connection between his position as an auditor and the loss to which he had contributed.

“Even though Bengt J’s participation in the restructuring of [the company] and the transfer of its assets exceeds to a certain degree his proper duties as an auditor, it was in his capacity as an auditor that the company’s management employed him to assist in the reconstruction of the company. His conduct should therefore be related to such measures regarding administration which are referred to in Chapter 10 section 7 of the Swedish Companies Act. To the extent in which [the auditor] has acted contrary to the generally accepted auditing standards, he is also in breach of the provisions of this section.”

The Supreme Court also established it as proven that the misleading valuation of the company’s assets and the price set for the transfer of certain rights from the company to another company had to be regarded as having affected the bank’s decision concerning the granting of credit.

Due to the above a relevant causal connection was established between the auditor’s conduct and the granting of credit. In addition, the bank’s loss was considered to have been caused directly by the decision concerning the granting of credit. Had the bank received correct information, it should have never granted the credit, and therefore never suffered the loss.

Unlike in some other cases in which the Supreme Court has been criticised due to a very strict culpa assessment, no criticism *in this part* has been levelled against the Court. On the contrary, there is no doubt that it was the auditor’s conduct which had caused the loss. Despite that the case gave rise to debates especially among auditors, in which especially the fact that the Supreme Court had succeeded in ‘pressing in’ the auditor’s responsibility under section 15 of the Companies Act was discussed. He was not even employed as an auditor by the company when he caused the loss, and Chapter 10 section 7 of the Swedish Companies Act deals with auditors’ liability connected with the examination of the annual report, the accounts and the administration of the board of directors and the managing director.

The ‘balance sheet’ presented by the auditor to the bank was, however, neither of the above. The auditor’s conduct was an example of a clear disregard for the code of professional ethics for accountants rather than for the generally accepted auditing standards. The implications of the case would in such a case be that auditors employed by a company would have a far-reaching, personal liability for damages for such losses as have been caused in their capacity as consultants, in which case their liability should rather be limited by the provisions of Chapter 4, section 1 of the Tort Liability Act concerning employees. The criticism levelled at the Supreme Court for its choice of the method by means of which liability was imposed on the auditor has thus been strong.³⁷

³⁷ See Pehrson, *Omfattande ansvar för bolagsrevisorer*, JT 1996-97, p. 133 ff.; Gometz, *HD vidgar revisorns ansvar*, JT 1996-97, p. 214 ff.; and Leffler, *Om gråsparvar och revisorers ansvar – några synpunkter på NJA 1996*, p. 224, JT 1996-97, p. 541 ff.

As in other tort law it is possible to impose liability for damages on professionals in relation to third parties in the way the Supreme Court did in the NJA 1987, p. 692 case discussed above, by way of application of general principles.

Essentially, one must try to identify the norm which has been established for the support of a third party's interests, which has been violated by the professional. If we look, for example, at sections 41 and 42 of the Code of Conduct for Lawyers, clearly formulated norms can be found, entailing that a lawyer may be regarded to have a certain duty of loyalty in relation to the customer's opposing party. Disregard of this duty may trigger off liability for damages in relation to a third party.

Neither auditors, valuers or lawyers are, however, the only professional classes who owe a duty of loyalty in relation to a third party. In the same way as liability in relation to a third party has been prescribed by law for several categories of agents, other categories of agents and mediators may expect that the special statutory provisions may be applied analogously, or that liability may be imposed according to the general principles of tort law.

9 Limitations on Adviser's Liability

Similarly to other persons employed on assignment who risk having to pay damages, also advisers have to consider the measures that can be undertaken in order to limit or counteract their liability. In the first place exemptions from liability and insurance protection become relevant here. This section discusses the means of limiting liability, whereas the following section deals with insurance questions.

The greatest problem for an adviser is the question of whether it is possible for him to introduce for commercial reasons extensive limitations of liability into his assignment contract, as well as when such a measure can and should be undertaken. In cases when a formal contract is not concluded and the adviser has therefore no possibility to present to his client an offer with the accompanying general terms concerning his services, it may be physically impossible for him to introduce the necessary clauses.

Another question concerns the way in which such clauses shall be formulated. The legal situation is uncertain since there are hardly any precedents to be followed. In NJA 1987, p. 692, concerning a valuer's liability to a third party the Supreme Court delivered a statement which indicates that the Supreme Court is in no way negative towards exemptions from liability in a professional context. It was stated that liability for damages concerning a person who undertakes valuation of property in his professional capacity may arise with regard to both the client and a third party 'as long as no reservation has been made in the certificate concerning exemption from such liability'. If the exemption from liability can be legally effective with regard to a third party, it must also be effective with regard to the client.

It is questionable, however, if a professional can exempt himself from the rules of professional ethics applicable to a given profession. It is, for example,

not very probable that a lawyer could exempt himself from the provisions of the code of conduct for lawyers.

The answer to the question concerning exemption from liability can be found perhaps in the general rules of the law of contract, stipulating that an exemption must not be too general. If such is the case, the exemption has always a chance of coming into conflict with section 36 of the Swedish Contracts Act, which will make it ineffective.

The exemption may perhaps also have to be more closely related to the assignment. One possibility would be to formulate a description of the assignment undertaken by the adviser, which would entail that an indirect exemption will come into being. One could perhaps describe the things one has undertaken to do or not to do, restricting in this way the client's reliance on the information conveyed.

The question of whether such an exemption could be supplemented by, for example, a *monetary limitation* of the adviser's liability can be discussed, even though the real value of such exemptions appears always to be somewhat uncertain.

In my opinion exemption clauses or other similar ways of limitation of liability do not appear as the most suitable manner of protection of a negligent adviser against too extensive liability for damages. Both ethical considerations and various aspects connected with consumer protection are difficult to reconcile with exemption from liability as a practicable way of liability limitation. The risk that such exemption clauses will be repudiated on the basis of section 36 of the Swedish Contracts Act is rather apparent, which makes this way too uncertain for an adviser who wishes to protect himself against ruinous claims for damages. It is insurance instead which should be allowed more scope when deciding the way in which an adviser should protect his interests.

10 Liability Insurance and Adviser's Liability – the Principles of Adjustment

This section does not discuss the great amount of different insurance products that can be found on the market and used by professional advisers in order to reduce the risks of personal responsibility. Neither does it discuss the usually difficult interpretation problems which are connected with such insurance products. Instead, the question of the relationship between the tortfeasor's insurance and the personal responsibility will be considered here.

This is where the prerequisites for the adjustment of liability for damages become relevant.³⁸ The reason for this is that an obvious starting point for a discussion of a possible adjustment of liability is that a professional adviser must be aware of the risks which are connected with his business activities, which is why he is 'forced' to take out liability insurance.

For certain professionals, such as lawyers and accountants, this requirement is a *sine qua non*. These groups are obliged to have such liability insurance up to a

³⁸ Cf. Kleineman, *Adjustment of the tortious liability of professionals. Some reflections on current legal developments*; in Essays in honour of Hugo Tiberg, 1996, p. 401 ff.

certain amount, whereas other groups do not have such an obligation. It is not always, however, that the coverage provided by the obligatory or basic insurance is sufficient. The insurance coverage may be judged as insufficient without further complementation in relation to the scope of the business activities and the risks connected with them.

If one has access to liability insurance – or to put it more precisely – if the situation is such that the person in question *could have* taken out a liability insurance policy, the initial question seems to be how one should go about deciding what insurance coverage the tortfeasor *ought to have*. This question must be related in turn to the professional's ability to estimate his insurance needs. Bengtsson has argued that larger companies ought to satisfy higher requirements as regards proper estimation of their insurance needs than smaller companies.³⁹

An auditing company or a law firm belonging to the most eminent ones in its business sector must be assumed to possess liability insurance which is the best that the market can offer. If a person acting in his professional capacity has such insurance, there would be, in principle, no reason to reduce the liability that can be imposed on the professional, unless there has been contributory negligence on the part of the injured party.

The prerequisites for the adjustment of liability for damages are regulated in the first place by the general provisions concerning reduction of liability for damages in Chapter 6, section 2 of the Tort Liability Act. To some extent the special adjustment provisions of Chapter 6, section 1, subsections 2 and 3 of the Tort Liability Act can also be used, in which reduction of the amount of compensation for loss of or damage to property or for financial loss is dependent on whether the person suffering the damage or loss has contributed thereto.

Of special interest are also the special adjustment provisions of Chapter 15, section 5 of the Companies Act, in which liability of members of boards of directors, managing directors and auditors can be adjusted 'in accordance with that which is reasonable, taking into consideration the nature of the acts, the extent of the damage, and the circumstances in general.'

Despite the fact that these special provisions do not wholly correspond to the general adjustment provisions of Chapter 6, section 2 of the Tort Liability Act, one may assume that the practical consequences of the wording of the respective provisions will not be so great that principally the same reasons for the adjustment of extensive liability of an auditor will be applicable irrespective of the fact whether liability is imposed on him under the Companies Act or on the basis of general liability in tort.

Even though Hellner has pointed out⁴⁰ that Nial expressed doubts whether the different formulations would lead to any real difference in the application of the adjustment provisions of the law of business associations and the general adjustment provisions of Chapter 6 section 2 of the Tort Liability Act, he maintains at the same time that both preparatory materials and case law indicate

³⁹ Bengtsson, *Om jämkning av skadestånd*, 1982, p. 254.

⁴⁰ *Skadeståndsrätt*, 5th ed., 1995, p. 435.

that there is such a difference.⁴¹ It should be observed here, however, that the difference may become smaller if also the contractual reduction provisions of section 70 of the Sales of Goods Act are taken into consideration, which might provide guidance regarding the contractual adviser's liability.

The fact that Chapter 6, section 2 of the Tort Liability Act takes only into account the liable party's 'financial situation', even though at the same time regard must 'also' be taken to 'the victim's need for compensation' should entail that no practical difference arises in the application of Chapter 15 section 5 of the Swedish Companies Act and Chapter 6 section 2 of the Tort Liability Act.

In the explanatory statements to the Tort Liability Act it can be noticed that an attempt has been made to harmonise the rules for organs' representation with the general principles of liability regarding adjustment of damages.⁴² The minister pointed out, however, that the question was complicated, confining himself to the following general observations:

"Here, as in other cases, it must be up to the courts to decide on the basis of the special provisions and the legal-political considerations underlying the different regulatory systems the extensiveness of the modifying consequences of the special provisions of the law of business associations."⁴³

In determining when adjustment shall be made in view of the available insurance possibilities I start from the following vantage point. As long as the person acting in his professional capacity is *not* guilty of a criminal act, which may already occur in certain cases when the person has acted with gross negligence,⁴⁴ it is my opinion that one should start from the premise that professional liability shall *not* be able to destroy that person's finances, making the continuation of his further professional activities and his social position considerably more difficult.

It is the responsibility of the professional, however, to counteract such risks by undertaking preventive measures. He must show that he is insured in a suitable way. If liability insurance exists, the starting point should be that 'damages in relation to the liable party can certainly not be considered as unreasonable if the damage is covered by liability insurance'.⁴⁵ Certain other circumstances must be considered. For example, the injured party's financial circumstances and his own insurance policies or insurance possibilities may be taken into account.

The Minister held, however, that these circumstances 'cannot constitute independent grounds for adjustment'.⁴⁶ The Minister argued that one

⁴¹ Hellner åberopar (loc. cit. p. 435, note 14), inter alia NJA 1986, p. 402.

⁴² See, Bill 1972:5, p. 432 ff.

⁴³ Loc. cit. p. 433.

⁴⁴ Cf. The Penal Code, Ch. 9, s. 9, subs. 2.

⁴⁵ See Bill 1975:12, p. 138.

⁴⁶ See Bill 1975:12, p. 138.

“should not introduce a possibility of reducing the damages even in cases when the liable party has the ability to pay, but when the injured party is even better off financially”.⁴⁷

The adjustment provisions may not be used as a ‘device in order to achieve full economic justice’. In order to reach this aim ‘other legal rules must be consulted’.⁴⁸ Neither should the injured party’s own insurance possibilities ‘constitute an independent reason for adjustment’.

The most important explanatory statement to Chapter 6, section 2 of the Tort Liability Act seems to be, however, the pronouncement that if there is an insurance policy against loss or damage, covering the damage, there should be normally no question of any adjustment at all. The explanatory statement reads in the following way:

“Damages [can] never be regarded as unreasonably burdensome for the liable party if they are covered by a liability insurance, or when the responsible party is to be regarded as self-insured.”⁴⁹

This would mean, in turn, that only if the professional can produce an excusable reason for his failure to take out or renew an insurance policy which he earlier had, might it appear as unreasonable to impose full damages.⁵⁰

Bengtsson is very clear on this point in his work ‘Om jämkning av skadestånd’:

“The basic prerequisite [to reduce damages is] the fact that the damages are so burdensome that it will be difficult for the liable party to make the payment. This prerequisite is untenable whenever there is a liability insurance policy covering the damage – in this respect the preparatory materials leave no room for any doubt.”

The consequence of the above-quoted passage would be, however, that if the damage exceeded the amount of the insurance, it would be possible to reduce the amount of damages by the sum which would be in excess of the amount of the insurance, and which the responsible professional would otherwise have to pay out of his own pocket.⁵¹

It is therefore important to make sure that one has pertinent liability insurance. Any incentive to reduce the amount of insurance coverage must therefore be met with scepticism. If the insurance coverage available on the market at the time could be decisive for what is regarded as reasonable insurance coverage from the point of view of adjustment, there is a certain risk that the

⁴⁷ See Bill 1975:12, p. 139

⁴⁸ See Bill 1975:12, p. 139.

⁴⁹ See Bill 1975:12, p. 176.

⁵⁰ Compare with NJA 1992, p. 782, mentioned earlier, in which the question was what the insured might be credited with in the case of his oversight to take out or renew a liability insurance policy.

⁵¹ Cf. Bengtsson, loc. cit, p. 254.

market simply might wish to reduce the amount of insurance in order to keep down the insurance costs.

As it is, the insurance market today should be able to offer almost unlimited insurance protection in the Swedish context, since the insurance products found on this market are of international origin, coming from countries with favourable conditions for the development of very good insurance products.

What has been stated above does not need to absolutely rule out certain limited possibilities of protecting the liable party in cases where the insurance coverage is deficient and the injured party is financially well off. The state of the law must still be considered as very uncertain in such cases, however.

11 Adviser's Liability of Public Administration

It is a very controversial issue whether liability for damages for misleading information or wrong advice can be imposed, or in any case, whether it should be possible to impose such liability, on the public administration, i.e. the State or a municipality. Chapter 3, section 2 of the Tort Liability Act does not make this issue clear. The question is whether such a supply of information can be regarded to have taken place 'in the course of the exercise of public authority', and will therefore depend on the way in which the meaning of this concept is perceived. As is often the case in the field of the law of damages scholarly conceptual analyses seldom provide lucid answers to difficult questions.⁵²

Since the Supreme Court's clearly strict interpretation (with the smallest possible majority) of the meaning of the concept of doing something 'in the course of the exercise of public authority' in NJA 1987, p. 535, demands for new legislation in this area have been made.

In 1993 the Committee for the Revision of the Public Administration's Liability for Damages submitted a proposal designed to promote more clear regulation of the public administration's duty to inform.⁵³ The issue was thereafter examined by the legislature and different variants of the ways in which the statutory regulation could be formulated have been discussed. The current legal system before the expected reform can hardly be described, however, as such in which it would be impossible to impose liability on the public administration for carelessly supplied misleading information.⁵⁴

In the first of the two cases reported in NJA 1985, p. 696 (I and II) liability for damages was imposed on the State when a private individual suffered financial loss due to incorrect information supplied by a civil servant employed by the local insurance office. The Supreme Court found that the incorrect information supplied by the civil servant had such a close connection with

⁵² Cf. NJA 1996, p. 68, and Kleineman, JT 1993-94, p. 727 ff., *Begreppsbildningen och den skadeståndsrättsliga analysen*.

⁵³ See SOU 1993:55

⁵⁴ See Bengtsson, *Det allmännas ansvar enligt skadeståndslagen*, 2nd ed., 1996, p. 98 ff.

parental allowance cases that the information was to be regarded as supplied in the exercise of public authority.⁵⁵

On my part I would be hesitant about the value of legal regulation which is too precise and detailed in the manner proposed by the Committee, since such regulation would probably lead to new interpretation problems and attempts to solve these problems with increasingly involved conceptual analyses.

Instead, I have suggested rules oriented towards a more general type of clause, which would afford greater possibilities to impose damages on representatives of public administration when incorrect information has been given by them, without entailing that the courts' obligation to impose damages would be determined in a manner which would restrict the administration's decisions all too much.

A report from the Council on Legislation was submitted while this paper was being proof-read. According to the report liability shall arise if, having regard to the circumstances, special reasons prevail, with attention paid to the nature of the advice, the connection with the authority's sphere of activities and the circumstances at the time the advice was given.⁵⁶

12 Conclusions

The question concerning professional adviser's liability has not been sufficiently considered in the Swedish law. Despite the fact that a considerable number of recent judicial decisions is available, the literature has not demonstrated any real interest in this problem on a larger scale.

Personally, I think that one of the biggest problems is to be able to resist liability becoming too far-reaching. As we well know, examples can be found in other countries in which liability has been constantly expanding, due to the fact that the courts had a very strict view of these questions. Certain tendencies in the same direction can already be seen in Sweden.

The advice seeker's protection must constantly be weighed against the adviser's social functions and the consequences that might ensue if liability were to become too extensive. Even consumer interests must be weighed against the probability of the affected businesses becoming crippled by a ceaseless stream of claims for damages.

Especially the possibilities of the insurance systems being able to anticipate liability that might arise have to be taken into consideration. The day on which the insurance market is no longer able to provide adequate insurance protection – which has occurred abroad – would signal that liability has been permitted to expand too much. Development in this direction must therefore be curbed by way of legislation.⁵⁷

There is reason enough to alert the public to the dangers of such a trend already today, but at the same time we must try to make the rules concerning

⁵⁵ Cf. SOU 1993:55, p. 108.

⁵⁶ Refer to the Report of the Council on Legislation of 5 February 1998.

⁵⁷ Cf. Joseph J Norton, *Comparative Perspective: The United States' Experience with Class Action Suits and the Need for Curative Legislation*, JT 1997-98, p. 11 ff., especially p. 24 ff.

liability in damages less rigid than they are today in the case of, for example, the public administration's liability.

Needless to say, the consumer interests concerning the preservation of the quality of advisory functions and other activities where information is supplied must never be neglected, either in the private or the public sector.