

# Exemption of Liability – Where to Draw the Line

Catarina af Sandeberg<sup>1</sup>

## Introduction

The value of disclaimers is well known. The case of *Hedley Byrne v. Heller*<sup>2</sup> is widely spoken of as a precedent on negligent misstatement. However the judgement is strictly obiter as the defendant succeeded because of the inclusion of a disclaimer. A valuation document contained a clause exempting the valuer of liability, and the clause was ruled to stand. In Sweden the Kone case NJA 1987 s. 692 leads to a similar conclusion.<sup>3</sup> Even though both cases dealt with negligent valuation performed by a professional valuer employed by a construction company they have in respectively United Kingdom and Sweden acted as seminal cases on exemption clauses, highlighted when a professional advisor of any kind has performed a breach in diligence or duty while pursuing an investigation on behalf of a client, and this has led to a loss for the client.

Professional advisors often consider exemption clauses to be a necessary component in modern practice. Professional individuals paid for their services as accountants, auditors, financial consultants and legal advisors thus protect themselves against claims through various types of exemption clauses, also known as exoneration or exclusion clauses, sometimes disclaimers, in other words provisions to protect advisors from their liabilities in respect of acts or omissions.

Recent corporate scandals have led to attention being paid particularly to the role and responsibilities of financial consultants, accountants and auditors. In a row of scandals auditors have been claimed to be negligent in their auditing of

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<sup>1</sup> The author is working on a three-year project regarding the validity of exemption clauses.

<sup>2</sup> [1964] AC 465, [1963] 2 All E.R. 575 (H.L.). See also *Hadley v. Baxendale* [1854].

<sup>3</sup> The number of cases dealing with exemption clauses are in Sweden relatively few. Since the Swedish legislation is set against a background of consultation and cooperation between interest groups, big business and government many disputes are resolved before they reach court.

publicly held companies, leading to great losses for the investors. Since the possibility of seeking cover through exemption clauses is comparably unrestricted, shelter has in many cases been given to the professional advisor by the utilization of such clauses, which has contributed to the questioning of the use of exemption clauses. The question arises whether reliance on exemption clauses is seriously endangering the interests of the persons or companies whom the service is directed to promote.

The question of exempting liability is divided into two, limiting liability in a contractual relationship, and limiting liability to third parties. This article deals comprehensively with the appropriateness of exemption clauses, in other words if exemption from liability to pay damages normally shall be permitted where an auditor or a financial consultant, acting in his profession offering services to the general public, has been acting negligent while pursuing a service to a client.

In the following sub-sections the legal effects and the lawfulness of the above mentioned clauses will be discussed.

### **The Occurrence of Exemptions**

Exemption clauses aim to exclude or restrict liability to remunerate another party for a loss, in advisory situations as a result of a wrongful advice given by a professional advisor. Exemption clauses appear in standardised agreements, such as agreements regarding investments, and in agreed documents. A clause in an agreed document is however normally standardised, for instance a bank would use the same wording in dealing with all customers also in an agreed document:

- Replies are believed to be accurate but their accuracy is not guaranteed and they do not obviate the need to make appropriate searches, enquiries and inspections.
- Confidential. For your private use and without responsibility on the part of the bank or its officials.<sup>4</sup>
- Pursuant to the Swedish Contracts Act, the terms of an agreement may be modified or set aside by a court to the extent that such terms are deemed to create unreasonable results, even if the circumstances giving rise thereto have arisen after the agreement was entered to.

An *exemption clause* typically provides that the professional shall not be liable for a loss, which has injured the contracting party other than for gross negligence, fraud or wilful default. A clause may however wholly exclude any duty of care, thus the professional can act however negligently and still not risk to be held liable in case of a sufficient clause in the contract.

As well as clauses, which seek simply to exclude or restrict liability for breach of duty or diligence, there are *limitation clauses*, which limit the amount that the professional can be liable to pay. The clause can limit or exclude certain

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<sup>4</sup> Hedley Byrne v. Heller [1964] AC 465, [1963] 2 All E.R. 575 (H.L.).

types of loss suffered by the client, or limit liability to the client to a specified sum.

An agreement may further contain a provision entitling the advisor to an indemnity in respect of liability for breach of duty, an *indemnity clause*.

Another type of clause, which must be distinguished from the former, is clauses, which qualify, in some specific respect:

- The due diligence is limited to agreements effectuated during 2003.

Qualifications occur frequently in letters of opinion and due diligence-agreements, often in the form of assumptions:<sup>5</sup>

We assume:

- The authenticity and completeness of all documents submitted to us as originals;
- The conformity to original documents of all documents submitted to us as copies and the authenticity and completeness of the original documents;

In an agreement regarding financial investments a clause can limit the liability to a certain type of damage, amount per incident, per series of incidences and per annum, and in addition, exclude:

- ...direct or indirect loss of profits, business or anticipated savings and indirect or consequential loss or damage.

The clauses all have the same practical effect from the point of view of the party who is seeking compensation as clauses, which exclude or restrict liability.

The term exemption clause is often and hereafter used to cover all three types of clauses.

## **The Nature of the Problem**

Historically it has not been customary for professionals as financial advisors and lawyers to seek to limit their liability for damage caused to a party through clauses in the agreement. On the contrary, in the area of the profession of advising there has been an implicit understanding that exclusion of liability is against the very core of the relation, and the contracting party shall confidently be able to rely on the advice. The development and the extension of the liability of negligence have however had a severe impact on professional advising, leading to an increase in litigation. Auditors and accounting firms are accused of negligence when auditing the accounts of a company. Regarding financial

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<sup>5</sup> To be distinguished from audit-qualifications given by an auditor in an audit report.

consultants the cases involve wrongful financial advice when dealing with investments or taxes, or allegations of mismanagement resulting in a significant fall in value of deposited means. The professional advisors will, naturally, try to exclude and/or limit their liability in advance in order to minimize economic and legal uncertainties, and different forms of exemption clauses are commonly found in practice.

The validity of an exemption clause was considered in by the Ontario Super Court of Justice in *Ontario Ltd v. di Tomaso*<sup>6</sup> in a third party claim.

A corporation provided financing to an individual defendant, di Tomaso, relying on representation that di Tomaso was entitled to certain tax credits assigned to a corporation as security. In a letter of opinion di Tomaso's accountants PriceWaterhouseCoopers, PWC, provided written estimate of investment tax credits available and opinion of validity of scientific research and experimental development expenditures claimed by di Tomaso. No such tax credits were however available and significant portion of financing was lost. The corporation brought action for damages for negligent misrepresentation, consequently di Tomaso brought a third party claim against PWC seeking contribution and indemnity. PWC then brought motion to strike out the third party claim. PWC claimed that it could not be sued since the letter of opinion contained express disclaimer. PWC relied in its denial on the famous statement made by Lord Reid of the British House of Lords in the above-mentioned case of *Hedley Byrne & Co. v. Heller & Partners Ltd.* In this case Lord Reid stated that a person giving information or advise could be excused from responsibility if he or she gives the information or advise with a clear qualification that he or she accepts no responsibility for it.<sup>7</sup>

In a British claim against PWC, *Killick v. PWC*,<sup>8</sup> the executors of H's estate, K sought summary judgment in an action against PWC for professional negligence.

H had owned a substantial shareholding in a company, BGG, and following his death BGG, in accordance with a "buy back" provision in its Articles of Association, requested that PWC should prepare a valuation of H's shareholding. PWC duly produced a valuation of £2.1 per share. The bulk of the shareholding was subsequently sold at that price. Following the sale, a report was prepared by a second firm of accountants, which valued the shares at £4 each. Proceedings were consequently issued against PWC in negligence seeking damages in excess of £30 million. The court had to establish whether the liability could be subject to a clause in the contract between the company and accountant limiting liability and, if so, whether such a clause fulfilled the requirements of reasonableness within the Unfair Contract Terms Act 1977.<sup>9</sup>

Under the heading "Terms of Business" the letter referred to the terms of business attached to the letter and continued as follows:

"Your attention is drawn to clause 7 which sets out important restrictions on our potential liability, including in the circumstances of our being held to be in

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<sup>6</sup> 914151 *Ontario Ltd. V. Di Tomaso*, (1999), B.L.R. (2d) 159.

<sup>7</sup> [1964] AC 465, [1963] 2 All E.R. 575 (H.L.) at 9.

<sup>8</sup> *Killick v. PriceWaterhouseCoopers (NO.1)* [2001] 1 B.C.L.C. 65. [2001] PNLR 1.

<sup>9</sup> See section 4.2 *infra*.

breach of any contractual or tortious obligations. It is reasonable that we agree at the outset the maximum amount of our potential liability provided that such limitation is not unfair. You and we agree that this represents your and our joint judgment of the extent to which it is reasonable for us to bear liability in connection with this engagement. You and we agree that this maximum amount is fair in view of the scope and size of the Services and the risks we assume in carrying out the Services compared to the fees we will receive”.

The terms included under paragraph 7 “Liability” the following:

“7.4 A liability cap. We will accept liability to pay damages in respect of loss or damage suffered by you as a direct result of breach of our contractual obligations or negligence ... but ... the total aggregate liability of Price Waterhouse Cooper ... resulting losses damages costs and expenses shall in no circumstances exceed 10 million.”

The disclaimer in the letters of opinion was however judged to be not so extensive as to excuse negligence of the alleged magnitude.

### ***Where to draw the line***

In Sweden the principle that no clause can relieve, release or exonerate a professional advisor from liability for breach of duty arising from his own fraud, wilful misconduct or gross negligence rules, primarily based on the prohibition of unreasonable terms in the Contracts Act.<sup>10</sup> In the literature is suggested that exemption from this rule can be made in cases where the injured party is protected by insurance.<sup>11</sup> The legal situation regarding damage caused by negligence which is not to be considered to be gross is however unclear.

Scheme rules typically exempt the professional advisor from liability for acting negligent of a certain degree. Loss caused by negligence of a professional advisor is not unusual, and the question is to what extent the culprit shall be able to resort from liability of negligent conduct through exemption clauses. Shall a professional advisor be permitted to exclude liability for breach of duty to use care and skill in the performance of his profession? And does a qualified opinion allow for instance a financial advisor immunity from negligence?

Further - if ordinary negligence is to be excusable - next question is whether “gross negligence” is a sufficiently clear concept such that courts would be able to establish whether a professionals’ conduct in any particular case has crossed the border from the merely negligent to the grossly negligent.<sup>12</sup>

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<sup>10</sup> SFS 1915:218, sec 36. Bernitz, Ulf, *Standardavtalsrätt*, Stockholm 1993, pp. 53 and 88 f., SOU 2002:41 at 44.

<sup>11</sup> Hellner, Jan, *Skadeståndsrätt*, Stockholm 1995, at 85.

<sup>12</sup> Other difficulties may however also arise here, such as to what extent the advisor is allowed to act in a manner which is objectively irresponsible. A typical example is whether a financial consultant shall be able to speculate freely with a customers’ means. This could in some circumstances be perfectly acceptable, but not in other customer relations.

It is sometimes stated that whether negligence so found is to be perceived as “gross” or “ordinary” lies in the eye of the beholder. In below discussed *Armitage v. Nurse*,<sup>13</sup> Lord Millett said of English law:

[While] we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree.<sup>14</sup>

In a Swedish case from 1992, which dealt with limitation of liability in an agreement regarding construction, NJA 1992 s. 130 is stated as follows:

Within the field of tort and insurance liability it is established that the degree of negligence<sup>15</sup> must be severe to be considered as gross, normally the case is a behaviour bordering that of wilfulness, in other words it shows a certain degree of ruthlessness or indifference which entails a considerable risk for damage. (Prop 1975:12 p. 133 and 173, 1975/76:15 p. 69 and 1979/80:9 p. 154; compare SOU 1986:56 p. 587 and 1989:88 p. 181). Not even in cases where the actor has been conscious of a risk of severe damage the action is always considered to be gross, at least not when the case concerns adjustment of remuneration due to the fact that the injured party has been part cause to a physical damage or adjustment of remuneration by insurance ....(see SOU 1989:88 p. 181 and Bertil Bengtsson, *Om jämkning av skadestånd*, 1982 p. 81).<sup>16</sup>

Pursuing a profession it is difficult to be successful in every case. Sometimes the success is even out of reach for the professionals’ control.<sup>17</sup> Also in other cases the professional cannot always guarantee success, for instance due to the complexity of the task. The problems of defining a standard which could be generally acceptable is obvious, not the least while analysing previous cases in the field. A professional advisor is however bound by professional standards to attain a recognised measure of skill and competence in the course of his work. The Swedish legislator has recently stated that:

“A culpa based liability aims to target financial advisors who in any way divert from prevalent standard in his way of work or in his judgements.”<sup>18</sup>

What diverts professional advisors from other occupations is the character of the work; especially competent advising followed by special effort, both performed with particular quality and intellectuality.<sup>19</sup> A professional advisor shall thus pursue his work with professionalism and skill, and with due diligence.<sup>20</sup>

<sup>13</sup> *Armitage v. Nurse*, [1998] Ch 241, infra section 4.2.

<sup>14</sup> *Ibid*, at 254.

<sup>15</sup> Translated from “vårdslöshet”, author remark.

<sup>16</sup> Author translation.

<sup>17</sup> As in an unexpected change in legislation.

<sup>18</sup> Prop 2003/03:133 at 32, author translation.

<sup>19</sup> Jørgensen, Stig & Wanscher, Torben, *Professionelt ansvar i skandinavisk ret*, Juristen 1967 at 425.

<sup>20</sup> NJA 1987 at 692, Kleineman, Jan, *Rådgivares informationsansvar – en probleminventering*, SvJT 1998 at 185.

The scope of the professional's possibility of limiting his liability should then be reduced to actions or omissions falling somewhere between those which can be excused as honest and reasonable mistakes and those which amount to inexcusable negligence.

### **Attempts to Regulation**

Obviously there are restrictions on exemption clauses or duty modifying clauses and statutory provisions, which are directed at this area of the law. In various legal areas the legislator has already enacted legislation to restrict the invocation of exemption clauses.

The Unfair Terms in Consumer Contracts Directive 1993/13 of the European Economic Community strikes down any unfair terms in consumer contracts of sale and supply of services. The directive is in Sweden implemented by the Terms of Contract between Tradesmen and Consumer Act.<sup>21</sup>

### **Sweden**

In general, under Swedish law the parties are free to make their own bargain, and the courts will not interfere or question whether or not the terms are unreasonable. This principle is however restricted in a number of ways. Historically, as mentioned above, no clause could relieve, release or exonerate anyone from liability for breach of duty arising from his own fraud, wilful misconduct, and often not of gross negligence. The closest to codification of this principle is sec 36 in the Contracts Act.<sup>22</sup> In the above-mentioned NJA 1987 s. 692 the Supreme Court however stated that liability to pay damages for a person who in his occupation agrees to perform valuation of a building could be applied "unless he has disclaimed such liability in the valuation document." Exemption from liability is thus possible. A broad and general disclaimer can however be considered to be unreasonable and be declared void by applying sec 36 of the Contracts Act.

The main provision in Sweden is thus section 36 of the Contracts Act, which provides a general prohibition against unreasonable terms in contracts. The section was introduced in 1976, and provides that a contract term<sup>23</sup> can be modified or set aside if it is considered to be unreasonable. The section also provides that, in considering whether a term is unreasonable, the court should have regard not only to the contents of the agreement and the circumstances at the time it was formed, but also to "subsequent circumstances, and circumstances in general".<sup>24</sup> Furthermore, where the term is "of such significance for the agreement that it would be unreasonable to demand the

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<sup>21</sup> Lag (1994:1512) om avtalsvillkor i konsumentförhållanden.

<sup>22</sup> See supra note 4.

<sup>23</sup> The section also applies to "terms of any other legal relationships than that of contract": sec 36.3.

<sup>24</sup> Section 36.1.

continued enforceability of the remainder of the agreement with its terms unchanged,” the court has the power to modify other parts of the agreement or set it aside completely.<sup>25</sup> This section is aimed at protecting parties who are in the weaker position in the contract, however it does not exclude other contractual situations.

Paragraph 2 provides that, when considering the application of the section, particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship.

There is also the Terms of Contract between Tradesmen and Consumer Act, and Terms of Contract between Tradesmen Act, which seek to prevent the use of improper terms in contracts between tradesmen and consumers and between tradesmen.<sup>26</sup> According to these regulations the court can however not declare a clause in an agreement void, but the Market Court can prohibit the tradesman to use the clause in question in future agreements.

The possibility for an auditor or financial consultant to exclude liability is not yet regulated, but in a recent proposal the Swedish legislator has proposed to regulate the liability of financial advisors in a separate law, Consumer Liability in Financial Advising.<sup>27</sup> In the proposition is stated that a financial advisor cannot release or exonerate himself from liability arising from his own fraud, willful misconduct or gross negligence. Ordinary negligence can however be excused. In the proposal the rules are suggested to be compulsory in favour of the consumer. The relation can thus be formless. This means that an agreement, which limits the liability to remunerate the consumer, is void.<sup>28</sup>

### ***United Kingdom***

In the English legal system there are two sets of statutory provisions, which may have an impact on the validity of exemption clauses here discussed. Clauses of this kind are subject to the Uniform Contract Terms Act 1977, UCTA, and the Unfair Terms in Consumer Contracts Regulations 1994. Section 3 (1) in connection with 3 (2) (a) of the UCTA prevents a person from excluding or restricting his liability for negligence “by reference to any contract term or to a notice”, unless the term or notice “satisfies the requirement of reasonableness”.<sup>29</sup> The reasonableness test differs according to whether the term is a contract term or a notice, which has no contractual effect:

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<sup>25</sup> English translations are taken from Bernitz and Draper, *Consumer Protection in Sweden: Legislation, Institutions and Practice*, Stockholm 1986, and The Law Commission Consultation Paper No 166 The Scottish Law Commission Discussion Paper No 119 UNFAIR TERMS IN CONTRACTS A Joint Consultation Paper, at 180.

<sup>26</sup> SFS 1994:1512 and SFS 1984:292. The regulation of unfair contract terms in the other Scandinavian countries is broadly the same.

<sup>27</sup> Prop. 2002/03:133, the law is to come into force July 1, 2004.

<sup>28</sup> *Ibid.* at 180.

<sup>29</sup> 1977 Act, ss 2(2), 3(2), 4(1), 6(3), 7(3), 7(4).



(1) Where it is a contract term, it must have been “a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made”.<sup>30</sup>

(2) Where it is a notice, the question is whether “it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen”.<sup>31</sup>

Schedule 2 to the 1977 Act sets out “guidelines” to which regard must be paid where the reasonableness test is applied to certain contracts.<sup>32</sup> These include the relative strengths of the parties’ bargaining positions, any inducement made to the customer to agree to the term and the extent of the customer’s knowledge of the term.

Regarding auditors there are important restrictions on the possibilities to exclude or limit liability for breach of contract or negligence to both his client and third parties. Section 310 of the Companies Act 1985 (“1985 Act”) provides that any provision which exempts an auditor from liability or indemnifies him against any liability which would otherwise attach to him in respect of negligence, default, breach of duty or breach of trust in relation to the company audit is void.

Section 727 of the 1985 Act enables an auditor to apply to the court to be excused from liability in respect of claims for negligence, default, breach of duty or breach of trust, on the basis that the auditor has acted honestly and reasonably, and having regard to all the circumstances, he ought fairly to be excused.

For all other work, the ability of an accountant to exclude or limit liability is dependent on the provisions of the Unfair Contract Terms 1977 (UCTA) or, in certain cases, the Unfair Terms in Consumer Contracts Regulations 1999. To be enforceable any exclusion or limitation clause must satisfy the reasonableness test.

In the United Kingdom the question of exemption clauses has been discussed over the years. The disclaimer in the above mentioned case *Hedley Byrne v. Heller* was very broad, as the opinion was given “...without responsibility on the part of the bank or its officials,”<sup>33</sup> and one might wonder whether the courts reasoning would be the same today. A recent decision indicating that it would have led to a debate regarding the use of exemption clauses in the terms of a trust fund. In the United Kingdom it is usual that trustee exemption clauses exempt trustees from any liability for anything except personal and individual fraud, and the appropriateness of this has been questioned over the years. The above-mentioned case *Armitage v. Nurse* dealt with an action by the trust beneficiaries claiming damages against the trustees for breach of trust.

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<sup>30</sup> 1977 Act, s 11(1).

<sup>31</sup> 1977 Act, s 11(3).

<sup>32</sup> Those contracts governed by ss 6(3) and 7(3) only.

<sup>33</sup> *Hedley Byrne & Co. v. Heller & Partners Ltd.* [819639 2 All E.R. 575 (U.K. H.L.)] p 5.

*Armitage v. Nurse* concerned a marriage settlement. The settled property consisted largely of land farmed by a company, the directors of which were the mother and grandmother of the claimant beneficiary. Following a substantial fall in the value of the land between 1984 and 1987, the plaintiff claimed that the trustees were in breach of trust as regards the management and investment of the fund, as a result of which substantial loss had been caused.

Clause 15 of the settlement provided:

“No trustee shall be liable for any loss or damage which may happen to [the plaintiff’s] fund or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud...”.

The court held that clause 15 exempted the trustee from liability for loss or damage to the trust property “no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly”.<sup>34</sup>

Prior to this case there were doubts as to whether liability for gross negligence could be validly excluded by the terms of the trust. The Trustee Act 2000 does not make any attempt to regulate the use of trustee exemption clauses, the inclusion of which in trust instruments has become more common in recent years. The Trustee Act 2000 expressly states that the statutory duty of care does not apply:

... if or in so far as it appears from the trust instrument that the duty is not meant to apply.<sup>35</sup>

Following *Armitage v. Nurse*, it is clear that a trust deed can exclude a trustee’s liability for anything other than dishonesty.<sup>36</sup> However negligent, lazy or misguided the trustees may have been, they cannot be held liable for the loss that they have caused to the trust fund.

The present situation governing trustee exemption clauses has been criticised on a number of grounds,<sup>37</sup> and has led to an attempt to regulate the validity of exemption clauses in the terms of a trust fund.<sup>38</sup>

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<sup>34</sup> *Armitage v. Nurse* [1998] Ch 241, at 251.

<sup>35</sup> Trustee Act 2000, Sched 1, para 7.

<sup>36</sup> In Scotland it is not possible to exclude liability for gross negligence, which is because Scottish law retains some concepts of Roman law including the principle that ‘gross negligence is equivalent to fraud or bad faith’, discussed in *Midland Bank Trustee (Jersey) Ltd v. Federated Pension Services Ltd* [1996] PLR 179.

<sup>37</sup> “The view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence should not be able to rely on a trustee exemption clause excluding liability for gross negligence.”, Lord Millett in *Armitage v. Nurse*, at 253.

<sup>38</sup> The Law Commission Consultation Paper No 171 TRUSTEE EXEMPTION CLAUSES, A Consultation Paper, Dec 2002.

## Exemption Clauses and the Theory of Reliance

Professional advising is pursued in several different categories of professions. In an early British case was stated that

... a profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation might vary from time to time. The word "profession" used to be confined to the three learned profession; the Church, Medicine and Law. It has now, I think, a wider meaning.<sup>39</sup>

Thus professions as auditors, actuaries and financial advisors are professions, which have been developed since this statement.

Professional advising does however divert from other forms of professions in a number of ways. Professional advisors hold themselves out as having special knowledge, skills and experience, and charge for the services they provide. They are often expected to uphold certain moral and ethic considerations exceeding normal honesty, and to exercise a certain duty towards the community.<sup>40</sup> A professional advisor is furthermore often certified, and connected to an organisation rendering him high status. This creates a particular position of trust in relation to the other party, leading to an imbalance between the parties, as in the case of solicitor/client, financial advisor/customer. In the Swedish preparatory work to sec 36 of the Contracts Act it was emphasized that normally companies and private persons offering their services through business shall not be accepted to claim protection through general and wide limitation clauses.<sup>41</sup> The reasoning implies that for instance lawyers, auditors, banks etc. create such reliance and justified expectations that clauses of limitation appear to be unreasonable. Companies and highly qualified servants accepting to pursue important services towards the general public, thereby rendering payment mirroring the significance of the service, should thus normally not be able to exempt liability at any degree of negligence while pursuing their services.<sup>42</sup>

The reasoning has in the doctrine been named the theory of reliance.<sup>43</sup> Where a person has shown justified reliance in a professional there are thus good reasons to look severely upon the liability, especially when the professional must have realised that the client relied on the given advice.<sup>44</sup> A determining factor is

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<sup>39</sup> Lord Scrutton in *I.R.C. v. Maxse* (1919) 1 K.B. s. 657.

<sup>40</sup> Which sometimes interferes with the interests of their client, as in the case of the obligation of auditors and lawyers to account for circumstances.

<sup>41</sup> Prop. 1975/76:81 at 123 f.

<sup>42</sup> See Heuman, Lars, *Advokatens rättsutredningar*, Stockholm 1987, at 31 f., Vinding Kruse, Anders, *Advokatansvaret*, Köpenhamn 1985, at 113 f.

<sup>43</sup> See eg. Fuller, L., & Perdue, N., *The Reliance Interest in Contract Damages*, Yale L.J. 1936 at 52, Kleineman, Jan, *Om den befogade tillitens skadeståndsrättsliga relevans*, JT 2001-02 at 625.

<sup>44</sup> Kleineman, Jan, *Rådgivares informationsansvar - en probleminventering*, SvJT 1998 at 187.

whether the advisor has performed in a professional way and that the contractual party has had justified reason to rely on the advice rendered. This is the case particularly when the professional advisor must have realised that the client will rely on the given advice.<sup>45</sup>

On the other hand the question whether the reliance can be justified when an exemption from liability is at hand can be discussed:

A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not.<sup>46</sup>

The inclusion of an exemption clause might act as a warning, which excludes the possibility of claiming reliance, and “legal liability”.<sup>47</sup> The situation is however different in situations of specified exemptions, such as qualifications and assumptions.

### **Economic Implications**

The economic impact of a change in regulation is an important consideration. It is clear that exemption clauses are widely used in advisory situations, and that professional advisors have come to rely upon them as affording a means of protection from liability for breach in diligence. Many advisors, in particular those operating in highly specialised areas, regard exemption clauses as a prerequisite to acting as an advisor. A regulation of the possibility to use exemptions would increase the risk to a certain extent. An exemption clause provides security, especially from the threat of litigation.

It is nowadays unusual that the individuals in question are not covered by insurance, and one might argue that liability insurance can be a sufficient alternative to exemption clauses.<sup>48</sup> Denying exclusion of liability for ordinary negligence might affect the general level of charges being made for the work, with the premiums being reflected (like other overheads) in the fees for the services provided. Naturally insurances are of great importance in situations in question, not least regarding allocation of risk. Exceptions are however always included in the policies, and there is further the question of coverage, since the maximum coverage quickly can be exceeded.

The threat of liability for ordinary negligence could however lead to professionals being more cautious in the manner of exercise of their services. The possibility of relying upon exemption clauses in so far as the conduct could not be described as negligent would furthermore prove more acceptable to the insurers.

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<sup>45</sup> See for instance above mentioned NJA 1987 s. 692.

<sup>46</sup> Lord Devlin in *Hedley Byrne & Co. v. Heller & Partners Ltd.* [819639 2 All E.R. 575 (U.K. H.L.)] at 533.

<sup>47</sup> See Feldhusen, Bruce, *Economic Negligence*, Toronto 1984, at 70 note 211.

<sup>48</sup> See e.g. *Mitchell Ltd. v. Finney Lock Seed Ltd.* [1983] 1 All E.R. 108.

## **Concluding Remarks**

The importance of liability based on reliance has emerged in tort as well as in contractual relations. The attitude that the person in possession of an information advantage shall be liable in case of misleading the counter party is thus developing.

There are obvious arguments in favour of restriction on the advisors ability to exclude liability. Invocation of exemption clauses in advisory situations can be argued to act against the core of the agreement, since the contracting party will lose the possibility of remedy despite the fact that the advisor has failed to fulfil the agreement to the best of his knowledge. Another argument is the possible inequality of bargaining power between the contracting parties, and furthermore the fact that a professional advisor with special skills or expertise should be liable for failing to meet the standards expected of the profession as a whole.

Swedish law does however not at present provide a readily available means for an injured party to claim, in case of negligence, that an exemption clause should not be invoked, and, as a result, professional advisors have considerable scope to protect themselves from liability for breach of diligence and duty. However, clearly where a statement of any kind has been qualified as to a specific matter, a person could not reasonably rely upon it without taking the qualification into account, and the qualification must provide a measure of protection.

It must be assumed that where a statement is made by a professional competent to inquire into the relevant matters, it will be implied that he was expressing a belief on substantial and reasonable grounds. In a case where the statement is not based on reasonable ground, the professional must remain liable. The clause will then only be adequate for the question whether the plaintiff acted reasonably in relying upon the statement.

The increased use of clauses of this kind in recent years has without doubt reduced the protection afforded to the counter parties in the event of breach of diligence, and there is a need to maintain a balance between the respective interests. Naturally it would not be justified to deny professional advisors all power to modify or to restrict the extent of their liability. But since the situation regarding the validity of a clause limiting professional advisors liability in case of negligence is uncertain, there is a need for clarification through regulation.