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Defensive advising strategies for legal professionals

COMMENTARY BY EMILY CAMPBELL, 18TH MARCH 2021

Over a series of short articles, I intend to examine ways in which legal advisers in the field of trusts and tax can methodically minimise risk in the way that they advise. This first piece examines how we have got to where we are.

The solicitors profession has longer experience of professional negligence actions against it than the Bar. The liability of a solicitor was established beyond doubt by the time of the decision in *Nocton v Lord Ashburton* in 1914[1]. By contrast, the liability of the Bar was established relatively late. Perhaps the earliest instance of an action against a barrister is the 1792 case of *Fell v Brown*[2]. It was an action for negligent pleading, and it failed on a point of principle, Lord Kenyon commenting that *"he believed this action was the first, and hoped it would be the last, of the kind"*. In subsequent decisions, reliance was placed on a decision of 1860[3], so that a barrister was immune from action even for paperwork until 1967[4], when the immunity was limited to court work, being wholly abolished only in 2002.

This background may have informed the Bar's traditional style of advising, which was often confident and cryptic. Two anecdotes illustrate the point. The first relates to the late William OAJ Danckwerts KC (father of well-known judge). Of him, JD Casswell recalled[5]:

[1] [1914] AC 932.
[2] (1792) Peake 131.
[3] *Swinfen v Lord Chelmesford* (1860) 5 H. & N. 890.
[4] *Rondel v Worsely* [1967] 1 AC 191.
[5] *A Lance for Liberty*, Harrap (1961).

"It was [in a solicitor's office in Essex Street] that I first learnt the value to a barrister of a clear, logical mind going immediately to the kernel of a problem and ignoring all extraneous matters: I had drafted long, detailed instructions for an opinion by [him], on an intricate local government law case and I waited anxiously to receive the document which stated his considered views. I was somewhat disconcerted on the return of the papers to find that his opinion was as follows:

(1) No.

(2) No.

D".

The second relates to FE Smith (later the Earl of Birkenhead LC). As recorded in *FE Smith, First Earl of Birkenhead*[6], Smith was called to the Savoy hotel in London on urgent legal business, where he encountered a stack of papers nearly four feet high. He was required to advise by nine o'clock the following morning. He ordered a bottle of champagne and two dozen oysters, working all night. The following morning he gave his opinion (correctly, as it transpired): *"There is no answer to this action for libel, and the damages must be enormous."*

Old habits die hard, and even to this day there are those who simply answer the question posed, state their opinion confidently and do not engage in any further analysis of what this means to the client in terms of risk or how that risk might be mitigated. I can imagine that in the past, once the great man had opined, it would have been considered bad form to ask: *"But what if you are wrong?"*, postulating as it did the unthinkable: the great man was fallible! Can you imagine?!!

The world is changing. In everyday life, the dimensions of risk have unfolded like the petals of a flower. Clients now want to know: *"But how sure are you?"; "Can you put a figure on that?"; "What are the consequences for me if your opinion is wrong, if a Court disagrees"; "How can I provide against the risk?"; "What risk is it reasonable for me to take?"; "What would you do in my position?".*

[6] By John Campbell, Pimlico (1983).

This series of articles will be in the following instalments:-

(1) What you learn from practising in the field of professional negligence;

(2) Know your client;

(3) Risk bargaining between adviser and client; and

(4) A risk checklist.

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