

## Over-Anxious Avoidance of Responsibility herein Limitation of Liability

©1997 by [George J. Vogler](#)

For longer than a quarter century, design professionals have experimented with the outwardly simple contract device their advisors call limitation of liability. The basic limitation of liability clause commonly provides:

Client agrees to limit the design professional's liability to Client for the design professional's negligent acts, errors and omissions to the greater of the amount of the design professional's fee or \$50,000.<sup>1</sup>

If upheld in court, responsibility for damages exceeding the limitation is avoided both by the design professional and the insurance company that would otherwise have paid the damages.

What is outwardly a simple contract arrangement and a potential relief from financial pain for some has consequences that are not much discussed. By limitation of liability, the client is made responsible above the limit for the design professional's negligence. The client's own damages may not be recovered. The client may be unable to recover damages paid to contractors and others on account of the design professional's negligence. These results occur even though the design professional otherwise has adequate insurance limits.

The same quarter century that saw the promotion of limitation of liability also witnessed numerous limitations and qualifications on professional services and responsibilities. Although well intended, some of the limitations are by now oddly quaint. Architects and engineers were told never to *inspect* and only to *observe* the construction work. Presumably, an architect was now to observe construction when, previously, all lawful holidays were observed but construction was inspected. Ambiguity isn't definite, but it definitely dilutes meaning, which skeptics think deliberate. Design professionals were advised never to *approve* shop drawings but only to review them and indicate what shall be furnished. The difference between *it's approved* and *furnish it* escapes both common sense and sober legal minds.

Limitation of liability is not quite quaint, but it is peculiar that there has been so little analysis. What analysis exists is mostly legal, which, if pertinent, is not at all thorough. What is legal is what a judge will allow, but you are not thoroughgoing if you believe that "...all your affairs are going well, because your lawsuit is not going badly. " As Pascal knew, if your concern is mainly legal, "...you are going to find out that you scarcely know what is happening. "<sup>2</sup>

This *Practice Note* is not much concerned with legal enforceability. The law is, anyway, split. Some courts uphold limitation of liability, while other courts do not. Neither result answers completely questions that arise when a professional contracts to avoid responsibility for negligence. Law is not asked and does not answer the most important question: What future do architects and engineers prefer? Judges do not know. Yet, we must know. The ideas we choose will have consequences for the future. With what sort of a future for architects and engineers is this idea called limitation of liability a part?

## Responsibility

Design professionals who include limitation of liability clauses in their contracts do not, in general, believe they are avoiding responsibility. They correctly believe they remain responsible for their work. Yet, if they are negligent in their performance (a possibility they must honestly have contemplated), limitation of liability has the express purpose of limiting their responsibility to pay for the damages they cause. Any paradox in that is explainable in our broad uses for the term responsible. We require a grammar for speaking about responsibility, or we will quarrel at every turn.

In a usable grammar, we are first responsible to someone. Then, we are responsible for something. Both are required in any statement about responsibility. Confusion is the inevitable result when one is not connected with the other.<sup>3</sup>

Armed with a simple grammar, we can say, "The design professional is responsible to the client for work that complies with the standards of the profession. " When limitation of liability intervenes, we can say with equal validity (and we will say if we are honest), "The design professional is not responsible to the client for damages from negligence that exceed the greater of the design professional's fee or \$50,000. " We use good grammar, sound logic and make perfectly good sense to say both and declare in the first statement that responsibility is assumed while in the second responsibility is avoided. We obscure the consequences of limitation of liability if we are reluctant to admit both statements in our grammar of responsibility. It is minimally candid to say responsibility is avoided by limitation of liability clauses, while contrary statements sorely beg the question.

## Advice and Futures

Every scrap of advice given is a prediction about the future that will follow if the advice is accepted. People who give advice represent that they know something about the future, presumably they know the future their listeners would prefer. Good advice for you, it will always turn out, is a future you will prefer when you get there, nothing less.

Limitation of liability is advice mainly from some insurance companies and legal advisors. Occasionally, but more rarely, is it advice from one architect or engineer to another. Presumably, some insurance companies and lawyers know the future that limitation of liability foretells, and they believe architects and engineers will prefer it when they arrive. That they are justified in their belief is not at all plain.

Responsibility is for architects and engineers old. Avoidance of responsibility, whether over-anxious or not, is new. Advocates of limitation of liability looking for persuasive arguments do not appeal to the design profession's long and consistent history of avoiding responsibility□there is none. Advocates cannot appeal to a well-accepted ethic for leaving damages caused by one's negligence unpaid (even when insurance is available), for that ethic never was. Professor Odo Marquard taught "What is to come requires what we come from; "<sup>4</sup> Our usual practices (what we come from) are unavoidable: They make organized thought and action possible and they cannot be bypassed. Still, our usual practices can be changed and frequently are. The advocate of change has the burden of proof for the change wanted.

Advocates of non-responsibility to any degree must begin with and depart from a position of responsibility. They must meet their burden of proof for change or they must (we all must) hold to responsibility, which is our usual practice□ What we come from.

The advocates' persuasion for limitation of liability is, in a few words of introduction, to a rational economy of responsibility, and moreover to economic rationality all the way around the table.

Advocates propose that responsibility for damages arising from negligence damages is (or should be treated as) an elastic economic unit. The unit is either a fixed sum (often given as \$50,000) or a larger sum depending on the amount of the professional fee. The general elasticity contended for is this: Above \$50,000 in damages, responsibility for negligence ought to grow to and not exceed the professional fee. In this economy of responsibility, architects and engineers who are well informed and who maximize the utility of their professional engagements will choose to limit their liability to clients for damages caused by their negligence to \$50,000 or the amount of their fee, if larger.

Moreover, clients, also well informed and to maximize their own utility, will agree to limit their architect's liability for professional negligence. Clients will believe the responsibility owed them (by a rational account they will find persuasive) is rightly measured by the amount of fee they pay. They will not expect, as a general rule, full recovery of damages caused them by negligence. Responsibility, then, is elastic against fee. Stated differently, the less paid for professional services, the greater is the sum clients will be willing to bear for their design professional's negligence. If responsibility were, to the contrary, relatively inelastic, clients would expect full responsibility for negligence damages even if the fees they paid were modest.

An informed architect's utility curve and a client's informed utility curve supposedly cross at a point marked limitation of liability. There, the deal is struck. Whether or not well informed people actually behave in this way or do in futures they will prefer needs a closer, long overdue look.

Advocates base their rational theory on two primary facts, a term used advisedly since facts are frequently different from those assumed.

First among all facts is the limited pay-off the architect or engineer receives from any one project. Profit is limited (in the immediate term) to a one-time return. The client on the other hand has, potentially, a much larger pay-off represented by a long stream of anticipated profits over the life of the project. That one person's stream is short and another's long on potential seems beside the point, but advocates believe it relevant to responsibility. This fact breaks down when the client is not the project owner, for example, the client is an architect or a contractor. The fact breaks down further when the stream of benefits from the project is not to the owner, where the beneficiary is the patron of a charity, for example.

The effect of the general principle advanced (at least for the "ownership " considered) is that people with short income streams should have relatively less responsibility **for** their own negligence **to** people with longer (perhaps richer) streams whom they serve. Specifically, the difference in their potential riches should be somehow balanced (any they will rationally want it balanced) by the richer party bearing some (perhaps a great deal) of the damages caused to them by the other's negligence.

The consequences should give everyone pause. *What we come from* is a tradition of individual responsibility for the consequences of our own conduct. *What is to come* by the advocates' worldview is individual responsibility shifted to the potentially richer, injured party whom professionals serve. These consequences are available. The question is whether they will be wanted.

Cost shifting to the client will strike some readers as an application of the "better risk bearer" theory of damage assessment sometimes used by courts in product liability cases. The theory is of doubtful support here due to potentially misidentifying any "better" risk bearer (recall the non-ownership and third party patron cases earlier), but any known form of the theory is certainly misapplied. Better risk bearing notions assessed risk and damages to *sellers* of products (and away from injured consumers) on the economic justification that sellers can allocate the cost of damage awards across the many product units they sell.

With limitation of liability, the assessment is on the *buyer* of services, which is the theory turned on its head. By any consistent use of the better risk bearer theory, it is the professional who sells many units of service and can allocate malpractice costs through the payment of insurance premiums.

Confounding the advocates' argument further is why (if short streams are the problem) architects and engineers are encouraged to look at one project at a time rather than streams long on potential. Professional careers are long on potential, longer than most. All that should figure in, but it seems not to.

Secondly, it is believed factual that the fee does not compensate the architect or engineer for the risk of professional practice in the exact project contemplated. Flipped over, clients underpay their architects and engineers. Presumably, if the fee compensated adequately for the risk we would not be having this discussion. Or, differently stated, our conversation would not qualify as a rational one in the advocates' worldview.

To this point, one might address the supposed imbalance by raising the professional fee. If the risk/reward imbalance analysis is remotely correct, then, the fee is as likely too low as the risk is too high. Devotees to rational choices would ask about that. When they do ask, it appears in the ordinary case that marginal increases in professional fees will meet resistance and competition from other architects and engineers less sensitive to risk or better able to manage its costs who will successfully drain away the business. Responsibility is in practice, then, relatively inelastic, contrary to the advocates' proposition. It has been frequently observed that rational theories are often spoiled by actual practice.

It is probable that the market has it about right. The tens of thousands of decisions by design professionals which have led them to accept professional tasks with historical responsibility attached and have, nevertheless, enabled them to prosper strongly suggest that risk is priced right in ordinary cases. Limitation of liability advocates are persuaded otherwise, and they encourage architects and engineers to see and appreciate the disparity between their reward (understood mostly as fee), their risk (contemplating malpractice cases), and the client's greater reward (suggesting good profits) but with little, if any, contemplation of the client's risk.

By any measure, a rational theory must account for all rewards and all risks. Advocates, by the nature of their advocacy, may argue only one side (and they do), but their rational theories are born incomplete. The position they actually end up defending is that risk directly affected by reducing negligence responsibility under ordinary circumstances is justified to correct a reward imbalance *vis-a-vis* the client.

That amounts to protest against the difficulties of a professional life as if one had been drafted into unfair, poorly paid circumstances. Successful professionals do not believe that.

The superficial appeal to the design professional is plain enough. Relief from some financial pain is promised. Architects and engineers might expect to pay less for insurance: Their insurance company might reward them for limiting its obligation to pay damages above the limit. Some insurance premiums have been credited with a grateful nod toward the limitation of liability practice. The insurance company's pay-off needs no further explanation.

The architect's utility curve, advocates say, runs straight through limitation of liability under ordinary circumstances. *What is to come*, diminished responsibility for negligence damages, depends on the client's well-informed utility curve intersecting limitation of liability under the same, ordinary circumstances. Failing that, the rational foundation is spoiled.

## Waiting at the Table

In ordinary cases where architects and engineers are readily available and willing (where responsibility is relatively inelastic), it is not at all apparent that the client's utility curve need ever intersect limitation of liability. Extraordinary cases may be different□ where the client may require exceptional skills unavailable except from a few, for example. Perhaps those few practice genuinely high-risk specialties, which accounts for their few numbers and the shortage of their services. In another case, the project may present such extraordinary risk of failure that no competent design professional will accept the commission if exposed to unlimited litigation costs and damages. Those are not the ordinary cases. They are extraordinary. If limitation of liability depends on rational choices by both the architect and the client, its most fertile ground will lie in extraordinary circumstances.

## Preprinted Paradox

The appeal to clients in ordinary cases has been difficult for both advocates and design professionals to explain in a rational choice proposition. That is to say in answer to the question: Why in an ordinary case a fully informed client would maximize utility by taking on any liability for professional negligence damages that would otherwise be paid by the design professional and his or her insurance company?

Leaving this difficult question unanswered for too long has made an opportunity for alternative maneuvers. The clause might gain more acceptance if preprinted in a standard form of agreement. Some advocates recommend preprinting to attain "more success " in securing the limitation clause Preprinting limitation of liability clauses in contract forms may fix the opportunity to secure the clause without explanation. What that has to do with the client's well informed rational choice favoring reduced responsibility to them is nowhere explained.

Printed paper puts the limitation into play. When clients sign, the limit is in: When clients object, the clause can be dropped. The proposition in the ordinary case is not so much rational choice as astute packaging. The message is buyer be wary.

To give advocates their due, all recommend a complete discussion about limitation of liability, even if preprinted. Too often, the preprint part of the advice gets into practice, but the full discussion does not.

People are left to their individual ethics here. The *determination* to accept the limit if a preprinted form is returned signed is a fair test of how much discussion was wanted in the first place. Decide for yourself.

The disconnect between preprinting the limit and about it has been sanctioned by some courts. In the California decision, *Markborough v. Superior Court* (1991) 227 Cal. App.3d705, an engineer's limitation of liability clause was enforced on a showing only that the client had an opportunity to negotiate the limit, while there was no proof whatever that negotiation actually took place. The implications in the future for the design professions from the *Markborough* message are ominous.<sup>5</sup>

Readers who do include a preprinted limitation of liability provision in their contracts probably think my objection is not as realistic as it should be. Negotiations are business, after all, so why shouldn't limitation of liability be put in play as a matter of course? Why shouldn't a professional have a pre-imprinted design to accept a preprinted limit on his or her responsibility every time, regardless of the client's well informed decision?

A realist has the reasons. A professional is defined in two directions all at once. First, professionals are people allowed to do something others outside the profession may not do: In this case, practice architecture or engineering. Second, professionals are defined by what they will refrain from doing that others outside the profession may freely do. If both parts of the definition did not apply, professionals would be people with more privileges but no greater responsibilities than others not in the profession. We know that is untrue and in no event sustainable in practice for long.

Preprinting means limited responsibility may be put in play silently□ in play without prior. The hedge of silence on limited responsibility is itself a paradox. One example will suffice. An architect or engineer must fully inform the client by all fact and logic about any use of relatively untried materials or unproven design. The requirement for that much dialogue is undeniable. A claim of professional negligence or irresponsibility for omitting that dialogue will most likely stick. In the same example, suppose the design professional had presented and accepted, silently, a preprinted limitation of liability signed and returned by the client.

Paradoxically, how is it a wrong practice to skip the dialogue before using untried, unproven materials and designs but a right practice to skip the dialogue on a contract clause to limit the design professional's responsibility for using untried, unproven materials and designs?

In neither case can the client assess the risks presented by the architect/engineer's decision without full disclosure□ particularly of the design and construction risks of the project, both known primarily (perhaps only) by the architect/engineer. If dialogue is right for placing the client at risk by design, then, dialogue is right for limiting responsibility for having done so.

The rule holds in all cases, including risks believed hypothetically only slight. Damages result also from designs professionals first believed quite ordinary. The breach between entrustment with the professional commission and diminished responsibility to any degree for its negligent completion is a puzzle professionals want to solve, but it is unsolvable for them without specific dialogue.

When silent, preprinted limitations and the determination to accept them if returned signed are practiced or condoned, the rational choice foundation of limitation of liability is scuttled. The client's choice is not fully informed, and the design professional is caught in a paradox with no rational escape.

## Make It So!

The rational choice model of reduced responsibility for negligence damages is incomplete from all accounts of it. The rational argument for the client in the ordinary case has not been well made. Nevertheless, we can give the advocates the benefit of the doubt and make it so. Since advice is both a recommendation for and a prediction about the future the recipient will prefer, we can accept the prediction and evaluate our preference for the future it offers. We can make it so, and evaluate.

Will design professionals prefer a future where printed forms containing limitation of liability are readily signed a la *Markborough*, and clients (for any reason, including the architect's persuasion) sign contracts containing limitation of liability in ordinary cases? That is, on projects without extraordinary risks?

Architects and engineers will want much in such a future. Certainly, they will want their negligence above the contract limit relieved by judges. Clients will bear the architect's negligence to the extent relieved. That much must occur in the recommended future, else limitation of liability has not had its promised effect. Both design professionals and their insurance companies will have saved money.

But architects and engineers in this future will want much more. They will want their damages unpaid, and at the same time they will want the result accepted as rational, even just, and, certainly, to bespeak the high standards of their profession. All this they will want in any future fit to inhabit.

Those things wanted in the future made just so are not controlled by the advocates, insurance companies, lawyers, or design professionals. We plainly see when we make it so that what in their true self-interest they want is returned to architects and engineers, if at all, by their clients alone.

The evaluation must return inevitably to the client's rational choice and the methods that lead clients to excuse architects and engineers (and their insurance companies) above a limit from damages caused them by professional negligence. The rational result wanted must be rational in the future if it can constitute the preferred future.

To begin with, under what circumstances will clients stand unpaid above a limit for the negligence of their architects and engineers and still admit the result is rational and just, their architect fair and professional? That is the question advocates are obligated to answer; not a different question; not an easier question; no appeal to the inequity of the risk/return ratio. What advocates of limitation of liability must answer is how shall clients be damaged, unpaid, have insurance denied into a long future, and still love architects and engineers?

Unless very hard questions are successfully answered, the future recommended by limitation of liability will be unfit for architects and engineers to inhabit. Their limitations will save them money, at first, until their clients suffer losses they believe unjust. Clients will tell their stories to one another, and they will arm themselves against a practice of non-responsibility they will call cunning, at best. Those who leave

damages strewn across the landscape that their insurance companies do not pay will become people who bear watching.

All that is wanted is attainable in circumscribed cases and not otherwise. The occurrence of so much at one time requires what R.M. Hare calls satisfaction of the client's **then for then** preferences.<sup>6</sup> Think about **now** and **then** for a critical moment (I will warn you at the most critical moment). The client who signs a limitation of liability provision expresses a preference **now** to pay for his architect's negligence above a limit **then** when he or she must pay up.

The preference may be very weak or just theoretical, as in a *Markborough* situation, where the preference was due to inattention, perhaps ignorance, or in another case where it was due to trust in the validity of the architect's overriding liability concerns. The client may well have a different preference **then** when actually called upon to bear the cost of the architect/engineer's negligence when the loss is known and neither the architect nor the architect's insurance company will pay. This is the client's critical **then for then** preference.

Skeptics of this analysis may ask why an architect or an engineer must satisfy the client's **then for then** preferences. A deal was made **now** that bound both parties. If negligence imposes costs on the client **then**, the architect/engineer is only collecting the benefit of the contract. Narrowly, yes. If we live as judges tell us we would collect what judges allow. If our affairs were going well because our lawsuits were not going badly, we would do as judges bid us do.

We can choose to live narrowly or broadly. Which shall it be? The veracity of the design professions depends on not leaving the landscape littered with unpaid damages without justification clients can believe in. Littering is a bad general practice. With what kind of a life is littering a part we would design? **Then** matters predominately because people are required to reside there.

Now, to the critical moment: We cannot expect the client to have a **then for then** preference to pay when the shock of loss smacks sudden and hard unless the client's **now for then** preference is fully informed by fact and logic and the fact of the limit is rational all around the table. This disqualifies *Markborough* circumstances. All clauses fitted into standard printed forms and urged by the architect to represent the industry standard, fail. Those who routinely represent that limitation of liability is their standard policy but who routinely delete the clause to secure the project when challenged do not pass. The project should sincerely fit the clause first.

Cases where the architect or engineer has not fully informed the client that no damages will be paid above the limit by either the design professional or an insurance company are also disqualified. Full information includes disclosure of the risks inherent in the project, the possibility of negligent performance, and the probability of damages exceeding the limit, perhaps by a great amount. Disclosure does not mean tell if asked: It means tell, nothing less.

## The Paradigmatic Rational Case

The paradigmatic rational case for the client's requisite **then for then** preference to pay for professional negligence is extraordinary. It requires presentation of risks that make the architectural or engineering outcome manifestly uncertain. The possibility of loss to the client must be palpable, a part of the current

reality, so that in the future --**then**-- the uncompensated loss will be an acceptable, if regrettable, resolution of the project.

Cases where clients can pay for their architect's and engineer's negligence and still love them are instances where the client can say, *We knew this could happen: We gave it our best shot, and this is just as close as we could come. We're human.* Examples include damaged structures that might be preserved by untried methods, projects predicated on speculative information or on techniques with predictably high failure rates, or environmental clean-up where the risk cannot be completely addressed by even the greatest care.

All satisfactory cases that would leave damages unpaid and still create a future of the kind architects and engineers would prefer are cases of extraordinary risk fully informed by fact and logic. The recommendation of limitation of liability for a generally applicable principle of responsibility is hubris.

## Over-anxious in the twenty-first century

Engineers and architects confronted their legal liabilities in the nineteen sixties and seventies. They turned inward with abundant help, probably too much help. Critics say lawyers and insurance companies in their haste to protect helped too much and too narrowly.

Some inward turning was useful, especially when it was introspective. In time, a very short time historically, professional practice improved, lawsuits eased, professional liability insurance markets multiplied, and much more insurance became available to design professionals at far more favorable prices. Limitation of liability is not the reason for that.

By any reasonable projection, the twenty-first century is the clients' century. New forms of far more vigorous competition will strive to serve domestic and foreign clients to restore their in-frastructure and launch new enterprises across oceans and continents.

Owners and their designers, builders, and financiers will form closer cooperatives. Liability will become less a matter of who will be stuck with the bill and more how to form alliances to design, finance, build, and operate systems that prosper every person. There is this future, and what remain are leftovers.

Responsibility will ever gain importance. Enterprises will compete to take on responsibility the better to win projects that are themselves conceived as systems of safety, security, health, opportunity and tranquillity. People headed into the twenty-first century are scrambling to organize alliances that deliver systems so conceived with reliability and responsibility.

Doubts about the future architects and engineers will prefer are resolved by global opportunity, global competition, high expectations, resources that are dear, and the talent of architects and engineers for adaptation.

The hand shapes the tool, but the tool in use also shapes the hand. The hand formed around limited responsibility in all general cases, situations of ordinary risk, may not grip well the tools of the preferred future.

In a profession that depends for its prosperity on taking responsibility to change the very face of Earth, the over-anxious avoidance of responsibility is itself a threat to prosperity. Design professionals anxious about legal liability a quarter century ago must not remain over-anxious today. In a future architects and engineers will prefer, limitation of liability will be relegated to those few extraordinary circumstances that call for its exceptional remedy.

---

1. The clause has numerous variations to cover contract liability, tort liability, and responsibility to contractors, and recovery might be limited in some clauses to the amount of the design professional's insurance.
  2. Blasé Pascal, "Letter from a Lawyer in Parliament, " in Cailliet and Blankenagel, eds., *Great Shorter Works of Pascal* (Westport: Greenwood Press, Publishers, 1974), p. 160
  3. Gabriel Moran, *A Grammar of Responsibility* (New York: Crossroad Publishing Company, 1996), p. 35.
  4. O.Marquard, *In Defense of the Accidental*, trans. Robert M. Wallace (Oxford, 1991) p.116, (*Apologie des Zufälligen. Philosophische Studien* [Stuttgart: Philipp Reklam, 1986]).
  5. See also, *Dresser Industries, Inc. v. Page Petroleum, Inc.* 853 S.W. 2d 505 (Tex. 1993), *Georgetown Steel Corp. V. Union Carbide Corp.*, 854 S.W.2d 493 (Mo. App. 1993).
  6. R.M. Hare, *Moral Thinking: Its Levels, Method and Point*, (Oxford:Oxford University Press, 1981), pp. 99-106.
- 

\* George J. Vogler is lawyer from Missouri, where he is President of Reserved Resource Insurance Agency. He specializes in professional liability insurance and loss prevention services for architects and engineers, a specialty he has pursued since the early 1970's. Mr. Vogler is a member and 1996-97 Chair of the Oklahoma Board of Registration for Engineers and Land Surveyors and is a member of the Committee on Ethics and Professionalism of the National Council of Examiners for Engineering and Surveying. Mr. Vogler is a graduate of the University of Kansas and received his law degree from the University of Washington. He is a member of the Missouri Bar.