Solicitors' negligence: who pays?

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Some professional negligence is inevitable. We all have gaps in our knowledge, and we all make slips, especially working under pressure. Usually we are lucky, and our client suffers no significant loss. Occasionally we are unlucky, and we must have the protection of insurance. This much is understandable.

But the profession is rife with deliberate negligence, work botched as a matter of policy. That is inexcusable, and it costs the botchers' colleagues dearly in extra work, higher indemnity premiums, and the bad will it earns the profession.

Negligence in practice

1 Acting recently for the buyer of a house from the developer of a new estate I had to cope with over 150 pages of documents like this:

> **The Vendor hereby covenants with the Purchaser that it will (so far as the same has not already been done) complete the making up of the new Estate roads footpaths and sewers serving the Plot and shown on the Plan to adoption the standard required by the Highway or other Authority free of expense ....**

Some of it made sense and some didn't. Much was thoroughly unreasonable. I spent some 15 hours considering the documents, negotiating amendments as best I could, keeping the client informed, and advising him of the risks when the developers' solicitors told us (as they usually did) to take it or leave it. Most of this work should have been unnecessary. I charged much more than most clients expect to pay for a conveyance, but less than my overheads for the time spent.

The other solicitors — I should say the unqualified clerks employed by them — agreed some of the minor points but argued: "There's nothing the matter with our draft. This is how it must be anyway. We have sold about 100 houses on this site with this documentation and you are the first to complain."

Unfortunately this is what I have come to expect it as almost inevitable when dealing with developers, institutions, and local authorities. The documents are almost always atrociously written, and few of those responsible for perpetrating them seem to care when they admit that their wording does not reflect their client's intentions.

But my thrust now is not against them but against those solicitors who accept this nonsense uncritically on behalf of the clients they are paid to protect. If they all stood up to the shoddy drafters there would be a rapid improvement.

2 In 1995 I was consulted by a man whose father had recently died intestate. The only other family was my client's brother. Neither brother had much money, and the father's estate consisted of some very modest savings and the council flat he had taken on a long lease some years before with the brother. The father had donated his 70 per cent discount under the Right-to-Buy scheme, and they had funded the other 30 per cent with a mortgage which they agreed would be the brother's responsibility. The brother had instructed solicitors on behalf of both of them. The solicitors had charged only £250 for acting on both purchase and mortgage. They had been able to do the work so cheaply because they had made no attempt to negotiate or advise on the terms of the lease, and there was no indication in the papers that they had even read it; nor did they consider or advise on the proposed equities, nor check that the instructions coming through the brother were those of the father. The result was predictable. When the father died the brother claimed that the flat passed to him under the right of survivorship, while my client was certain that his father had believed he was leaving half his share of the flat (whatever that was) to him. This cheap job cost the solicitors (or their insurers) about £100,000 in damages and costs — mostly costs.

3 More recently I applied, on behalf of the council tenant of a small shop, for licence to assign the lease to his daughter, who had worked with him for some time and who had effectively taken over the business. The lease entitled the tenant to assign with the landlord's written consent, not to be unreasonably withheld. With the application I submitted adequate references and my undertaking to pay reasonable costs. The local authority's employee told me he knew my client and his daughter and saw no problem with the assignment. But he wrote:

> **WITHOUT PREJUDICE & SUBJECT TO CONTRACT**
>
> **Prior to seeking Delegated Approval on this matter, I will require payment of the Council's surveyor and legal fees amounting to £500....**

He conceded that neither "without prejudice" nor "subject to contract" meant anything in this context; that the council was not entitled to withhold consent unreasonably; and that £500 was far above the going rate for the job. He did not argue when I told him that I would normally charge less than £100 when acting in these circumstances for a landlord. But this was "more or less the standard letter we send out; we send out hundreds and no-one ever objects". What were all the other tenants' solicitors doing for their fees?

SIF compounds the problem

On such evidence it is not surprising that our professional indemnity premiums are unacceptably high. They could be reduced by an extension of the penalty excess scheme: in cases of reckless neglect, SIF — who must of course pay the disgruntled clients — might reclaim a full indemnity from the offending solicitors. SIF should protect the firm which accidentally lets something slip occasionally, but not the firm which has a policy of skimping its work.