



Lawyers, surgeons, pilots and error-tolerant systems of work

The difficult truth is that even the most competent professionals will make occasional mistakes in their day-to-day work. Law firms must understand the likelihood and repercussions of these human errors and then take steps to mitigate the significant risks. By **Francis Dingwall**

Analysis of error-types, even in large law firms, indicates that ‘drafting errors’ (as opposed to ‘incorrect legal advice’) account for approximately 16 per cent of professional negligence claims. The figure has remained constant over the past eight years. Even in complex work areas, the statistics are consistent. According

to one survey, at large firms the most common error in commercial work is drafting errors in commercial contracts. And the most common error in non-domestic property work is again drafting errors, this time in commercial lease assignments.

Some of those ‘drafting errors’ relate to quality of thought; for instance, failing to think through the

effect of a clause. But many can be attributed to ‘document inaccuracy’ where an additional clause from a precedent is left in, or a vital clause is cut out, a ‘now’ becomes a ‘not’, an extra ‘0’ is inserted into a figure, an early draft is used instead of a later one, or a citation is incorrectly made.

What sort of solicitor is responsible for such document

inaccuracies? The culture of our profession, extensively educated to get things right, is that competent solicitors do not make mistakes. Is it only the feckless and the reckless, then, who make such mistakes?

We can turn to the world of medicine for assistance. In a study of a particular tricky surgical procedure performed on 165 occasions in different hospitals, an average of seven errors was reported in each operation, of which one was life-threatening. Likewise, in a study of pilot error, pilots were constantly

The culture of our profession, extensively educated to get things right, is that competent solicitors do not make mistakes. Is it only the feckless and the reckless, then, who make such mistakes?

observed for 44 operational hours, and the results, applied to all commercial pilots, indicated that there are over one million errors in the air annually. If you are reading this in flight, don't panic, but the truth is that all professionals, however competent, make errors all the time.

At this point, someone might reasonably interject that many solicitors never face a professional negligence claim through a 40-year career (at least in this country: in the USA, on average lawyers face three claims in their professional career). But whether a mistake generates a claim is a matter of chance. It depends on whether it happens to cause a loss, which is outside our control. A mistake in a contract may remain undiscovered, because no-one has cause to read the document once it has been signed. Difficulties arise when one party fails to honour his or her commitments, perhaps because of economic pressures in a time of recession like

the present. The other party revisits the document with a view to enforcing it, only to find that it does not say what it should.

We make errors not because we are all incompetent, but because competent solicitors are all human, and therefore fallible. In fact, the very wiring of our minds makes us prone to error. The mind has a limited 'workspace' for conscious thought. To free up that workspace, we reduce

some activities to skills that we can perform automatically, such as driving a car: we can change gears without our mind having to consciously engage (although it is working). Or we free up the workspace by applying rules: we all know that if a claim is for personal injury, then the limitation period is three years, and we do not need to apply conscious thought.

We make errors not because we are all incompetent, but because competent solicitors are all human, and therefore fallible. In fact, the very wiring of our minds makes us prone to error.

Errors in legal documents can cause substantial financial losses, and this is what makes professional-indemnity insurance expensive for lawyers, invariably the largest overhead after salaries and premises.

What is to be done, if even the most competent practitioner is doomed to make such errors? The answer is that we should not rely on

the competence of the individual. Solicitors should put in place error-tolerant systems of work, which support the individual drafting the document. We need successive layers of defences, barriers and safeguards. At their simplest, those systems will comprise proof-reading, but they need to go further than that. The firm's risk-management process should identify what systems are needed. In reviewing the options, managing partners will want to look at the technologies which are now available to assist.

This is not to say that we can rely exclusively on systems or technology in drafting documents, any more than in surgery or in flight. The competent lawyer does still remain at the heart of the business. A lawyer who dreams he or she is akin to a surgeon or a pilot should be left

with their dream intact, but we should all wake up to the fact that both those professions have moved beyond reliance on the competence of the individual alone.

Francis Dingwall is a partner in Legal Risk LLP Solicitors. He can be contacted at francis.dingwall@legalrisk.co.uk

