The Kiss of Death: Employer Liability for Inaccurate or Unfair References

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> But he that filches from me my good name
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> Robs me of that which not enriches him
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> And makes me poor indeed.
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> – *Othello*, Act III, scene iii.

I: INTRODUCTION

References play an increasingly important role in securing interviews and, ultimately, employment. As Lord Slynn observed in *Spring v Guardian Assurance plc*:[1]

> [I]n many cases an employee will stand no chance of getting another job, let alone a better job, unless he is given a reference.

Yet what happens when an employer declines to provide an employee with a

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1 [1994] 3 All ER 129, 161.

reference? Is there a duty on an employer to provide a reference, and if so, what care, if any, needs to be taken in its preparation?

This paper examines the developments in the law of negligence following *Spring* in the context of the provision of references by employers to former employees; developments which may be seen by some to cut across traditional legal doctrines separating the tort of negligence from defamation.[2] Despite acknowledging concerns raised by the New Zealand courts over the expansion of negligence into an area previously considered the sanctum of defamation, the House of Lords in *Spring* created a new category of negligence. Employers who supply an inaccurate reference may now be held liable in negligence to the person whom it concerned.

To what extent New Zealand courts will follow this decision remains uncertain.[3] The article begins by examining employer responsibility for the preparation and provision of references. The nature of the conflict between negligence and defamation is then identified, highlighting the relationship between the defence of qualified privilege and negligent misstatements. Following a review of the case law history pertinent to the *Spring* decision, consideration is then given to the possibility of the provision of references being an implied term in employment contracts. Lastly, overall conclusions are presented as to the way forward for New Zealand courts.

II: A GENERAL DUTY TO PROVIDE REFERENCES?

> The provision of ... references is a service regularly provided by employers to their employees; indeed, references are part of the currency of the modern employment market.[4]

1. An Obligation to Provide a Reference as of Right?

Neither the Employment Contracts Act 1991 nor the common law impose an obligation on employers to provide references for employees.[5] This is consistent

2 See generally Demopoulos, "Misleading References and Qualified Privilege" (1988) 104 LQR 191; Tettenborn, "Negligence v Defamation – A Little Awkwardness?" (1987) 47 CLJ 390; Holgate, "Give a Dog a Bad Name" (1994) 138 Sol J 1150; Tobin, "Negligence a Resurgence? *Spring v Guardian Assurance* in the House of Lords" (1994) NZLJ 320.

3 See *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659; *Gregory v Rangitikei District Council* [1995] 2 NZLR 208; *Fleming v Securities Commission* [1995] 2 NZLR 514; *Preece v Colonial Mutual General Insurance Co (New Zealand) Ltd* [1995] 3 NZLR 730; *Cashmere Pacific Ltd (In Receivership and Liquidation) v New Zealand Dairy Board* [1996] 1 NZLR 218.

4 *Spring v Guardian Assurance plc* [1994] 3 All ER 129, 146 per Lord Goff.

5 *Mazengarb's Employment Law* (1991-1997) B/151 para 1062. In *Gallear v J F Watson and Son Lt*

with the common law duty on employees not to misrepresent themselves when applying for work.

A prospective employee may not tender information which is false or misleading prior to employment. On the other hand, the law does not impose an obligation on the employee to volunteer negative information about their past service.[6] For individuals with a less than perfect employment record, the law has traditionally provided a form of protection by limiting the availability of negative information. The establishment of a general duty to provide references could lead to the practical annulment of that protection.[7]

Due to its non-compulsory character, the provision of references inherently involves an assumption of responsibility[8] which invites an analogy to be made with the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*[9]

2. An Obligation to Provide by Express Agreement?

In every employment contract the terms and conditions are first and foremost those expressly agreed upon by the parties. Where a written agreement exists, the courts have emphasised that the parties' intentions are, primarily, to be deduced from the express terms of the document.[10] Thus, if an agreement expressly provides for references to be given to an employee on termination of employment, failure to comply will constitute a breach of contract,[11] and the employee will be entitled to damages arising from the breach (leaving tortious liability to one side).

Yet a breach of contract may also arise in circumstances where the terms of the agreement to provide references are not expressed as an inter partes transaction, but are expressed more generally. A reasonable interpretation of such an agreement may allow a former employer to respond to genuine inquiries of

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(1979) 8 IRLR 306, 308 Talbolt J asserted, albeit without reasoned argument, that there was no implied term in a contract of employment that an employer is under a duty to provide a reference. See also *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575; *Spring v Guardian Assurance plc* [1993] 2 All ER 273. Nevertheless, in cases of redundancy it is often usual for an employer to assist the employee in finding alternative work by providing a reference. See Horn, Bartlett, Muir, Toogood, and Wilson, *Employment Contracts* (1991-1997) para 16.1.13.

6 *Cork v Kirby MacLean Ltd* [1952] 2 All ER 402.

7 Thus it follows that if a term was implied generally into employment contracts, a worker's ability to withhold negative information would in all likelihood be greatly reduced.

8 Manning, "Torts" [1995] NZLJ 169; Simpson, "What Amounts to an Assumption of Responsibility?" [1995] NZLJ 61.

9 Supra at note 5.

10 The court will also consider the circumstances surrounding the execution of the agreement: *TNT Express Worldwide (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, 687 (CA) per Cooke P (as he then was).

11 Aside from remedies available for breach of contract per se, failure to provide references, or provision of inaccurate references, might further lead to claims for breach of good faith or honesty.

prospective employers. In the course of answering such inquiries it is possible that negative information will be volunteered by a former employer.[12] Although contrary to an employee's wishes, the employer's action would be entirely consistent with the terms of the employment contract. In practice, however, whilst an employer is not obliged to accede to a unilateral variation of the contract, it would be unwise to provide information if the employee has requested it remain confidential. Where an employer has been requested not to disclose information, notwithstanding a contractual term to the contrary, it is open to the employee to argue that such action conflicts with the underlying good faith and trust implicit in the contract.

To avoid potential conflict, should the reference be justifiably poor, or negative information exist, it would be in both the employer and employee's interests that such a term be exercised solely at the discretion of the employee. Care in the construction and wording of such a term should not be overlooked.[13]

3. Implied Agreements

In *Spring* it was further suggested that a duty to supply references may arise on the basis of an implied term. This will be considered following the overall analysis of the case.

III: NEGLIGENCE, DEFAMATION, AND THE DEFENCE OF QUALIFIED PRIVILEGE

This issue involves the overlap between the torts of negligence and defamation. To date, New Zealand courts have viewed cases similar to *Spring* as involving an unacceptable encroachment by negligence into the field of defamation. In New Zealand, policy has operated against finding a duty of care, despite the arguably wider approach adopted in New Zealand courts in determining the duty of care in novel situations, in contrast to their English counterparts in the House of Lords.[14]

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12 For example, compare the provision which states: "On termination, the employer shall provide a reference *to the employee*" to the more general: "On termination, the employer shall provide a reference". Note, however, the impact of s 6 of the Privacy Act 1993 which requires that such a discloser of information be authorised to do so by the person about whom the information is given. See infra at note 120.

13 By way of example, an appropriate term could read as follows: "Upon request from the employee the employer shall provide a written reference as to the employee's work performance and character but shall not disclose such information, either orally or in writing, to persons other than the employee without express written permission from the employee".

14 For discussion of the distinction between the "wide" and "narrow" approaches for determining the duty of care in novel situations see Doulding and Mullender, "Tort Law, Incrementalism and the

In part this view has arisen because in the New Zealand cases of *Bell-Booth Group Ltd v Attorney-General*,[15] *Balfour v Attorney-General*,[16] and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigators Ltd: Mortenson v Laing*,[17] the court has treated the actions as essentially claims for loss of reputation. In *Bell-Booth* the Court held:[18]

> A claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action.

In contrast, the House of Lords in *Spring*, in holding that a duty of care was owed in the preparation and giving of references, emphasised that it was the loss of opportunity of employment, rather than reputation, which was a pivotal factor in characterising the situation as one of negligence:[19]

> A claim that a reference has been given negligently is essentially based on the fact, not so much that reputation has been damaged, as that a job, or an opportunity, has been lost.

1. The Concept of Defamation

Misleading statements injurious to an individual's reputation or character have generally been left to actions in defamation, injurious falsehood, breach of confidence or, in some instances contract.[20] In claiming defamation, a plaintiff is faced with proving three basic elements:

(i) The statement is defamatory;
(ii) The statement refers to or identifies the plaintiff; and
(iii) The statement has been published to a third party.

The tort essentially involves "the protection of personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion".[21] An action in defamation requires a judicious balancing by the court of protection of the individual's reputation with the rights of

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House of Lords" (1996) 47 N Ir Legal Q 12; Cooke, "An Impossible Distinction" (1991) 107 LQR 46; Mullender, "The Concept of Incrementalism in Anglo-Canadian Negligence Law" (1995) 74 Can Bar Rev 143.

15 [1989] 3 NZLR 149 (CA).

16 [1991] 1 NZLR 519 (CA).

17 [1992] 2 NZLR 282 (CA).

18 Supra at note 15, at 156 per Cooke P, quoting from *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399 per Hallett J.

19 Supra at note 1, at 161 per Lord Slynn.

20 Supra at note 15, at 155 per Cooke P.

21 Veeder, "The History and Theory of the Law of Defamation" (1903) 3 Colum L Rev 546, 546.

others to exercise free speech and opinion.[22]

A statement will be said to be defamatory if it has the tendency to lower the plaintiff's reputation in the estimation of right thinking members of society.[23] Though historically distinctions have been drawn between libel and slander,[24] the two actions have been merged into one.[25] As under the preceding regime, the defendant is for the most part considered strictly liable. It is not necessary to show an intention to defame for liability to accrue. Rather, it is enough to show that the defendant acted intentionally or negligently in publishing the statement to a third party.

2. The Conflict between Negligence and Defamation: the Defence of Qualified Privilege

The common law provides a range of defences in a defamation action, much of which has been partially codified.[26] In some circumstances a defence of *absolute privilege* is afforded to the maker of a defamatory statement. This arises in cases where maintaining freedom of speech overrides all other considerations. The circumstances in which absolute privilege exists are confined to a narrow class, with perhaps the most notable being parliamentary privilege.[27] Absolute privilege is not attached to the context but the occasion, and has been the subject of vigorous debate before the courts in recent times.[28]

Where the "scales of social values" are of less importance, privilege may still attach, albeit not absolutely. This is described as *qualified privilege* and has the potential to arise whenever:[29]

> [T]he person who makes [the] communication has an interest or a duty, *legal, social or moral,* to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

22 See the New Zealand Bill of Rights Act 1990, s 14: "Everybody has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form." For limits on the freedom of expression refer s 5: "the rights and freedoms ... may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

23 *Sim v Stretch* (1936) 52 TLR 669.

24 Libel requires a statement in some permanent or visible form (ie a written document). Slander includes spoken words or statements in other transitory form.

25 Defamation Act 1992, s 2(1).

26 Refer ss 8 and 9 of the Defamation Act 1992 for defences of truth and honest opinion, formerly justification and fair comment.

27 See generally May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed 1989). Other examples of absolute privilege include solicitor-client privilege, judicial proceedings, and marital communications.

28 *Cushing v Peters* [1996] DCR 322, where Judge Dalmer awarded $50,000 in exemplary and general damages against the defendant Member of Parliament. See also Harris, "Sharing the Privilege: Parliamentarians, Defamation and Bills of Rights" (1996) 8 Auckland U L Rev 45.

29 *Adam v Ward* [1917] AC 309, 334 per Lord Atkinson (emphasis added).

Qualified privilege remains an open class recognising changes in society on a case by case basis.[30] The general test is whether persons of ordinary intelligence and moral principle, or the great majority of right minded persons, would have considered it a duty to communicate the information to those to whom it was published.[31] In terms of employment references, it has in the past been recognised that the giving of a reference by an employer traditionally attracts the defence of qualified privilege.[32]

Qualified privilege is a conditional defence and can be lost upon proof of an improper motive or malice on the part of the publisher.[33] The term malice refers to the misuse of the privileged occasion for some other purpose than for which it was given by law rather than spite or desire to cause harm.[34] Examples include an attempt to cover up a previous misstatement, or distort a news story in order to heighten its appeal.[35] The courts have stressed that judges and juries should be slow to draw an inference of improper motive. Thus, "[t]he burden on the plaintiff to establish malice on the part of the defendant is a heavy one".[36]

The effect of holding an employer liable in negligence for the preparation of an inaccurate or unfair reference is that the defence of qualified privilege is circumvented and rendered ineffectual. An action which previously would have been brought in defamation, on the basis that it involved damage to reputation, and defended on the grounds of qualified privilege, now in light of *Spring* has new life in negligence. This effective merging of negligence and defamation has to date been actively resisted by the New Zealand courts, where Cooke P in *Bell-Booth*

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30 "The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men"; *Horrocks v Lowe* [1974] 1 All ER 662, 669 per Lord Diplock.

31 The privilege does not extend to communications to persons who have no interest in receiving the information; Fleming, *The Law of Torts* (8th ed 1992), 564-580.

32 See *Jackson v Hopperton* (1864) 16 CB (NS) 829 where an employer provided a reference stating his former employee was dishonest. The communication was held to be privileged in the absence of malice. In *Phelps v Kemsley* (1942) 168 LT 18 the plaintiff was employed as the confidential secretary of the defendant for four years. Following a nervous breakdown and a subsequent meeting with the defendant, the defendant telephoned the plaintiff's doctor, to advise he considered the plaintiff mentally deranged. The defendant suggested, inter alia, to the doctor that he should organise medical attention for the plaintiff. The plaintiff sued alleging slander, whereby the Court of Appeal held the communication to be subject to qualified privilege. See also Fleming, ibid, 565: "One of the most common instances of privilege is that of a former employer giving the character of a discharged servant at the request of someone proposing to engage him"; *Toogood v Spyring* (1834) 1 CM & R 181, 193; 149 ER 1044, 1049. See also *Riddick v Thames Bd Mills* [1977] 1 QB 881 where privilege attached to a report requested by the employer from one employee of another.

33 Qualified privilege can also be lost if there is excessive communication, ie where the method of publication exceeds what is reasonably appropriate for protecting the particular interest which the defendant is entitled to assert. See Fleming, supra at note 31, at 576; *Chapman v Ellesmere* [1932] 2 KB 431; *Cookson v Harewood* [1932] 2 KB 478n.

34 Fleming, supra at note 31; *Horrocks v Lowe* [1974] 1 All ER 662, 669-670.

35 Ibid, 577; *Collerton v MacLean* [1962] NZLR 1045.

36 Supra at note 1, at 156 per Lord Slynn.

Group reiterated the view that:[37]

> [T]he law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

3. Qualified Privilege and Free Speech

As noted, privilege serves to protect the maker of a statement's right to free speech. It is not within the scope of this paper to closely scrutinise where the balance lies in terms of individual reputation and free speech. However, it should be noted that when matters have been of public or general interest, the balance has tended to shift in favour of freer dissemination.[38]

The New Zealand courts' preference for affirming the importance of freedom of speech can arguably be seen as compatible with the underlying policy reasoning adopted by the House of Lords in *Spring*. There Lord Slynn, referring to the New Zealand decision *Bell-Booth Group*, rejected the notion that a finding of negligence would in any form limit free speech:[39]

> I do not accept the in terrorem arguments that to allow a claim in negligence will constitute a restriction on the freedom of speech .... [Employers] should be and are capable of being sufficiently robust as to express frank and honest views *after taking reasonable care* both as to the factual content and as to the opinion expressed. They will not shrink from the duty of taking reasonable care when they realise the importance of the reference both to the recipient ... and to the employee.

The point, stressed by the House of Lords, is that an extension to the laws of negligence should not necessarily equate to an adverse effect on the doctrine of freedom of speech. Rather, it promotes greater attention to the standard of "reasonable care" on the part of the employer in the preparation and provision of references.

IV: THE DEVELOPMENT OF THE COMMON LAW AND THE DUTY TO PROVIDE ACCURATE AND FAIR REFERENCES TO EMPLOYEES

In order to fully appreciate the importance of *Spring*, and the potential impact it may have on employment relations, it is necessary to discuss the background from which the decision emerged.

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37 Supra at note 15, at 156.

38 Fleming, supra at note 31, at 524; *Prebble v Television New Zealand* [1993] 3 NZLR 513.

39 Supra at note 1, at 162 (emphasis added).

1. The Beginning

(a) Lawton v BOC Transhield[40]

Lawton appears as the first case in a string of recent decisions focusing on the issue of negligently prepared references. The case has received considerable criticism from both academics and the New Zealand courts on the basis that it "involves an extension of the laws of negligence which flies in the teeth of express statements that anything less than malice in the making of a privileged statement cannot engage liability".[41]

The facts can be briefly summarised: The plaintiff was made redundant from his position as a lorry driver with the defendant (BOC). He obtained temporary work with two new employers, both of whom requested character references before making the position permanent. The reference provided by BOC stated that the plaintiff's general conduct, ability, reliability, timekeeping, and attendance were poor and that they would not re-employ him. The plaintiff was dismissed by his new employers and remained out of work for a further two years. He sued BOC in negligence, claiming damages for loss of wages, contending that the loss had been caused by BOC's negligence in providing an inaccurate or unfair reference. BOC argued that there was no proximity between themselves and the plaintiff such as to give rise to a duty of care to the plaintiff.

Before considering whether a duty could be derived from the general principles of liability as stated by Lord Wilberforce in *Anns v Merton*,[42] the High Court first looked at the applicability of *Hedley Byrne*. In that case, the House of Lords expressed the need for a "special relationship" between the parties before a duty of care could arise. Lord Devlin further held that foreseeability of loss was not in itself sufficient to create a duty of care:[43]

> [W]herever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer .... Where there is a general relationship of this sort it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

In determining what constitutes a "special relationship" Lord Reid considered that it could be found wherever:[44]

(i) A party seeking information or advice was trusting the other to exercise

40 Supra at note 5.

41 Demopoulos, supra at note 2, at 194 approved by Cooke P in *Bell-Booth Group Ltd v Attorney-General,* supra at note 15, at 156.

42 [1977] 2 All ER 492.

43 Supra at note 5, at 611.

44 Ibid, 583.

such a degree of care as in the circumstances required;

(ii) Where the other gave the information or advice when he or she knew or ought to have known that the inquirer was relying on it; and

(iii) It was reasonable in the first instance for the inquirer to exercise such trust.

The plaintiff had argued that because the defendant knew he had applied for work, the defendant also knew that an adverse reference would harm his prospects of obtaining employment. On this basis it was submitted that loss to the plaintiff was reasonably foreseeable if care was not taken.

The defendant argued that no special relationship existed on the basis that the company was not in the business of giving advice.[45] Furthermore, if a duty of care was owed, it was not owed to the plaintiff because there had been no assumption of responsibility towards him.[46]

Underpinning the argument that there should be recognition of a special relationship, giving rise to a duty of care, is the common law acknowledgment that an employment relationship involves a contract of special qualities:[47]

> The contract of employment cannot be equated with an ordinary commercial contract. It is a *special relationship* under which workers and employers have mutual obligations of confidence, trust and fair dealing.

The uniqueness of this relationship is further emphasised by judicial and statutory acknowledgment that termination does not necessarily bring an end to all of the parties' respective obligations.[48] In *Lawton* the "advice" given by the defendant was held to be "in the course of business" and therefore the fact that the defendant was not in the business of giving references did not prevent a special relationship arising:[49]

> [T]he question to be answered was whether the advice was given on a business occasion or in the

45 Relying on the narrow interpretation of *Hedley Byrne* in *Mutual Life and Citizen Assurance Co Ltd v Evatt* [1971] 1 All ER 150.

46 Benson, "High Court Recognises Liability for Negligent References" (1987) IRLIB 334.

47 *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711, 722 per Richardson J (emphasis added). See also *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666; [1982] ICR 693, 698 (CA) per Lord Denning: "[J]ust as a servant must be good and faithful, so an employer must be good and considerate".

48 Examples of statutory duties which continue notwithstanding termination include the provision of reasons for dismissal upon request, s 38 of the Employment Contracts Act 1991 ("ECA"), and the maintenance and provision of an employee's wage record for a period of six years, (ECA, s 47). Common law duties which may continue following termination include an employee's obligation not to disclose confidential information gained in the course of employment.

49 *Lawton*, supra at note 5, at 614. In obiter, his Honour found it unnecessary to determine the point but cited with authority the minority view in *Mutual Life and Citizens Assurance Co Ltd v Evatt*, supra at note 45, and *Esso Petroleum Co Ltd v Mardon* [1975] 1 All ER 203.

course of the business activities of the givers of the advice or information.

On the related issue of reliance, although the reference was never directly communicated to the plaintiff, Tudor Evans J had no hesitation in holding that the plaintiff had in fact relied on BOC to give an accurate opinion and state accurate facts in the reference:[50]

> If an employer receives an application from another employer for a reference about his departing or departed employee, it must be obvious that it is about the future employment, obvious that the employee has given the former employer as support and equally obvious that the employee relies upon his former employer to get the facts right.

Despite the absence of express reliance in this instance, authority was derived from Lord Denning in *Ministry of Housing and Local Government v Sharp*,[51] where the necessary special relationship was said to be a more stringent version of proximity, which is satisfied whenever a plaintiff was likely to be affected by the untruth of a statement:[52]

> In my opinion the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate. That is enough to bring the duty into being.

In obiter, Tudor Evans J went on to state that it was probable that the new employer was equally reliant on BOC to provide an accurate reference and BOC knew or ought to have known this fact.[53] Nevertheless, the judgment leaves open the question of whether a duty of care under a *Hedley Byrne* analysis applies in any "relationship" between a former employer and a prospective employer in the giving of references.

The final point under a *Hedley Byrne* analysis, and seemingly the most important distinguishing feature, relevant in reconciling the approach of the House of Lords in *Spring* with the New Zealand Court of Appeal is:[54]

> [The] assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill.

Having sidestepped the issue of reliance, Tudor Evans J observed that the

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50 *Lawton*, supra at note 5, at 615.

51 [1970] 1 All ER 1009.

52 *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, 1018-1019.

53 Supra at note 5, at 615.

54 Supra at note 1, at 145 per Lord Goff.

defendant was not obliged to provide a reference and, although not specifically addressed, it follows from the judgment that in electing to provide a reference the defendant necessarily assumed responsibility for its compilation.

Finding that the facts were sufficiently analogous with *Hedley Byrne* as to establish a prima facie duty of care, Tudor Evans J went on to consider whether a duty of care could also be found under *Anns*. He concluded that its two step approach would likewise provide clear authority for finding that a duty of care existed. In doing so, the Court considered that issues of public policy, or the fact that the loss was purely economic, should not militate against the finding of such a duty. Any threat of "opening the floodgates" was dismissed on the grounds that the only person affected was the employee.

Despite the establishment of a duty of care, the plaintiff was ultimately unsuccessful. It was held that the employer had expressed a reasonable opinion and therefore there was no actionable breach of the duty of care. However, his Lordship suggested that employers should make use of disclaimers to avoid liability in the future.[55]

Lawton is of particular importance as the question was never raised there of whether the claim ought to have been brought in defamation rather than negligence. This in turn raises the question of the applicability in these circumstances of the defence of qualified privilege. The Court held there was no evidence of malice or other improper motive. Hence, the defence of qualified privilege would arguably have shielded the defendant from liability, even had the statements been found to be untrue.[56]

The duty of care which was found to exist relied upon the application of *Hedley Byrne*. Arguably, this finding was achieved only by a strained analogy. *Hedley Byrne* is based upon a more specialised reasoning than the general laws of negligence and thus, ought not to be extended to cover all cases of negligent untruths; and strictly speaking, *Hedley Byrne* deals with advice received *gratis* or otherwise outside a contractual relationship.[57] The facts of *Lawton* do not find any untruth and also suggest a contractual relationship, albeit on limited terms. It would therefore seem that an *Anns* approach to determining the existence of the duty of care would have been preferable, leaving *Hedley Byrne* for cases where a prospective employer sues another employer for losses arising from a misleading positive reference.

Although not addressed, *Lawton* indicates that an action in negligence could be used to circumvent the defence of qualified privilege (which exists for an employer sued in defamation) when careless or inaccurate references have been provided. The case did not hold that in writing a critical reference an employer was under an

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55 Supra at note 5, at 617.

56 Ibid, 611, where his Lordship noted that the defendant was not found to have acted out of malice or expressed anything other than an honestly held opinion in the references.

57 Tettenborn, supra at note 2, at 391.

absolute obligation to get the facts right. The obligation was to take no more than reasonable care in the writing of the reference, accepting that inaccuracies might remain despite this.

2. The New Zealand Approach

(a) Bell-Booth Group Ltd v Attorney-General[58]

The New Zealand Court of Appeal considered the ramifications of *Lawton* in *Bell-Booth Group*. The plaintiff issued proceedings against the Ministry of Agriculture and Fisheries and the Broadcasting Corporation of New Zealand in relation to a television programme questioning the effectiveness of a product known as "Maxicrop". The plaintiff sued in defamation and, inter alia, sued the Ministry for negligence. The case in defamation was dismissed by the High Court on the grounds of justification. The Court, however, held that the Ministry was liable in negligence for breach of a duty to disclose to the plaintiff all of the results of a scientific trial prior to publication.[59]

On appeal the plaintiff challenged the quantum of damages awarded while the Ministry cross-appealed the finding of negligence. As the trial judge had found the statements made to be justified, the Court of Appeal approached the issue upon the central question of whether a claim in tort for negligence, based on injury to reputation, can exist when the statements sued upon have been found to be justified under a prior action in defamation.[60]

In coming to his decision that a duty of care was owed by the Ministry, the trial judge had found that a "special relationship" or an "implicit understanding" existed between the parties, an approach reminiscent of *Hedley Byrne* as discussed in *Lawton*. Although it may have been possible to argue that some form of contract governed the relationship between the parties, the ultimate finding was one of a non-contractual relationship. The Court of Appeal stated that had a contract been found, that would not necessarily have been fatal to a tortious action in negligence.[61] Rather, the duty would have been redefined to require the defendant to take reasonable care to safeguard the interests of the plaintiff.[62]

Adopting an *Anns* type approach, the Court of Appeal acknowledged that the proximity of the parties was sufficiently close to prima facie give rise to a duty of

58 Supra at note 15.

59 It was held the plaintiff was owed a duty to be allowed the opportunity to satisfy itself as to the results and be consulted as to their presentation.

60 Supra at note 15, at 152 per Cooke P.

61 *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 having been rejected in *Rowlands v Collow* [1992] 1 NZLR 178 and *Henderson v Merrett Syndicate Ltd* [1994] 3 All ER 506. See also Manning, supra at note 8.

62 Supra at note 15, at 155.

care, but that the Ministry's duties were nonetheless primarily to farmers and the greater public. It was also accepted that a claim for economic loss might invite the application of a control mechanism.[63] In these circumstances, where there was no contractual arrangement and no authority on point, it was further necessary to consider whether it was *just and reasonable* that a duty of care of a particular scope be imposed upon the defendant.[64]

Turning to reasons which tended against the imposition of a duty of care Cooke P stated:[65]

> What is crucial is to underline a feature standing out in the present case. The damages are admittedly claimed to consist in injury to reputation. The claim has to be seen as an attempt to impose a new fetter on free speech.
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>
> [T]he law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

The Court therefore resisted any merging of the principles of defamation with negligence. The rationale behind this was principally based on two policy considerations, namely the need to maintain free speech, and the need to preserve the tort of defamation and defence of qualified privilege for damage to reputation:[66]

> [J]ustice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, breach of contract or breach of confidence.

The Court viewed the case as falling outside the ambit of *Hedley Byrne*, and opted for the more general approach for determining liability using an *Anns* type analysis. In so doing the Court did not consider whether there had been an assumption of responsibility by the defendant to the plaintiff.

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63 Ibid, 155, citing *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 25.

64 Supra at note 15, at 155 per Cooke P: "[I]t is of course material to consider whether it is just and reasonable that a duty of care of particular scope should be incumbent upon the defendants". See also *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 241 per Lord Keith.

65 Supra at note 15, at 155-156.

66 Ibid, 157.

(b) Balfour v Attorney-General[67]

The Court of Appeal revisited the issue in *Balfour* on a somewhat unusual and distinct fact pattern. The plaintiff was a teacher during the period 1976-1980. During this time he found his promotion opportunities and attempts to be posted to different schools thwarted by persistent rumours of his alleged homosexuality. Disillusioned, he left teaching and went to work for the Department of Social Welfare as a social worker for children and young people. Still, some schools made it known that they considered him morally unsuitable. The Department asked him to resign but the plaintiff sought to continue. He was subsequently ordered not to visit certain schools. In 1985 he returned to teaching and was finally given a permanent position in 1986. During this time he had applied to over 100 teaching positions.

Later the plaintiff obtained access to his personal file, held by the Department of Education, on which he found a memorandum from one inspector to another stating that he was considered a "long practising and blatant homosexual".[68] He sued the Education Department claiming negligence on the basis that the memorandum had been put on his file without fair and reasonable investigation, with the consequence that the allegation of homosexuality had been acted upon and had become available to prospective employers. Included in his claim were general damages for harm to his career and reputation. He appealed against the High Court's finding that there was insufficient proof of causation between the memorandum and the damages claimed.

The plaintiff sought to establish the source of the duty of care (to ensure accuracy of its records) upon the notion of "reliance" and cited *Junior Books Ltd v Veitchi Co Ltd* as authority.[69] He argued that the reliance giving rise to the "special relationship" of proximity was derived in part from the Education Act 1964, namely:[70]

> [T]he Department being the principal repository of personal information about teachers, a teacher is necessarily dependent on it for references, recommendations and advice to prospective employers.

Upon this basis it was asserted that the Department was under "a duty to exercise care as to the accuracy of the information it records because the teacher

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67 Supra at note 16.

68 Ibid, 522.

69 [1982] 3 WLR 477. The House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908 accepted this case as an application of the principles laid down in *Hedley Byrne*. In this way the plaintiff was able to avoid reference to the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 which rejected foreseeability of harm as the test of proximity contrary to the New Zealand Court of Appeal in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553.

70 Supra at note 16, at 528. See also *Ministry of Housing and Local Government v Sharp*, supra at note 50, where a government department was the sole repository of certain information.

has little if any control over it, yet it is likely to affect his or her future career, perhaps profoundly".[71]

The plaintiff sought to distinguish his claim in negligence from one in defamation or injury to reputation. It was claimed that the Department's negligence was founded upon:

(i) The judgment passed by the inspector who wrote the memorandum;
(ii) The recording of the memorandum in the Department's file;
(iii) The subsequent judgments in rejecting the plaintiff's further application for training and employment; and
(iv) The recording in confirmation to whoever came to know of it of a belief already held in the local area.

The Court considered that in bringing the action in this way the plaintiff was "perilously close to defamation",[72] and that an inability to bring a claim within the criteria of a defamation suit is not to be made good by the formulation of a duty not to defame. Justice Hardie Boys concluded that any attempt to merge defamation and negligence was to be resisted.[73]

Instead, the Court accepted that the duty claimed must be formulated along the lines that the Department must avoid forming, and acting upon, a belief as to the character of a teacher without taking reasonable steps to verify that belief. A duty so formulated was not considered to trespass into the area of defamation. Assuming there was sufficient proximity in the relationship between the Department and the plaintiff, it remained open whether a duty of care should be recognised in the circumstances.

The Court considered it irrelevant in determining this issue whether one took either a "narrow" or "wide" incremental approach derived from the second stage of *Anns*. It held that policy operated against the finding of a duty of care. The Court considered that it was a necessary and legitimate action by the Department to maintain personal files containing information thought to be relevant to a teacher's suitability. To keep such records was consistent with the Department's role and its responsibilities to the wider community in protecting children's welfare. It was also considered that the balance of convenience outweighed the imposition of a duty of care:[74]

> While there may be injustice in denying a remedy ... it must surely be outweighed by the inconvenience and inhibition that would be caused if every adverse comment had to be verified before notice could be taken of it.

71 Supra at note 16, at 528.
72 Ibid, 529.
73 Ibid.
74 Ibid.

Interestingly, the Court adopted the position that on these facts neither an incremental or wider approach under *Anns* could give rise to a duty of care. In essence, the policy grounds were argued to be of such overwhelming importance that it would be inappropriate to hold the Department liable.

The Department throughout made no attempt to justify the allegation of homosexuality or the various imputations and insinuations alleged by the plaintiff. The Court held as a matter of fact that these allegations were groundless, but nevertheless went on to stress that the Department's primary duty was to protect children from any potential threat. Although the Court did not hesitate to accept that the Department also owed the plaintiff a duty to act justly and with discretion, they highlighted the difficulty in balancing the competing duties to employees and children when conflict arose:[75]

> There can be no criticism of action taken in the interests of the children, even if there is no more than suspicion, provided the action is appropriately restrained and rational, and the ultimate need for a balanced judgment on the validity of the suspicion is not lost sight of. It is clear that in the present case it was lost sight of.
>
> That however is not sufficient to found a cause of action for damages. Many injustices are done for which the law can provide no redress.

Notwithstanding that on appeal the plaintiff failed in his claim,[76] the dicta of Hardie Boys J concerning policy may seem, with respect, illogical. The Department's failure to prove that the plaintiff was indeed homosexual and more fundamentally, that this in turn necessarily represented a threat to children, begs the question as to why the Department's actions were considered "restrained and rational" in the circumstances. The case must therefore be viewed cautiously as a "period piece" reflecting the views of the Court in respect of a perceived relationship between sexual orientation and child abuse. It cannot be inferred from the judgment that the imposition of the duty of care failed because the claim was "perilously close to defamation". In the final analysis, the decision did not rely on the conflict between negligence and defamation.[77] Lord Slynn in *Spring*, though able to reconcile *Bell-Booth Group* and *South Pacific Manufacturing*, could find

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75 Ibid, 524.

76 The appeal failed because he was unable to show a causative nexus between the memorandum and the loss.

77 Changes in the law as well as greater awareness of the actual risk (or lack thereof) to children on the basis of an individual's sexual orientation mean that the case is unlikely to repeat itself. The Privacy Act 1993 now expressly provides that agencies "cannot use personal information without taking reasonable steps to ensure that the information is up to date, complete, relevant and not misleading" (Principle 8). See also the Privacy Act 1993 s 6, Principles 5 and 6; Fowler, "Fencelines or Welcome Signs" (1995) NZLJ 120, 122. Furthermore, the Humans Rights Act 1993, s 21(1)(m) prohibits discrimination on the grounds of sexual orientation.

no grounds upon which *Balfour* could sit comfortably with his judgment:[78]

> It seems to me extraordinary that, if the remarks were untrue about the named individual and written without malice (so that no claim lay in defamation) but that the teacher lost a job as a result, there should be no possibility for the employee to claim in negligence.

A closer reading of *Balfour* suggests that it was not the encroachment into the field of defamation which prevented the finding of a duty of care, but the balancing of the Department's social obligations with those owed to the plaintiff (ie the duty owed to others was greater than that owed to the plaintiff). On this basis, there is no reason why *Balfour* cannot still sit with the majority reasoning in *Spring*. Nevertheless, the case appears confined to its facts and outside further application in this area.

(c) *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*[79]

In *South Pacific Manufacturing* the Court of Appeal returned to consider the relationship between negligence and defamation.[80] This time the question was whether professional investigators, under contract to an insurance company, owed a duty of care to the insured. The investigators were to produce a report concerning a fire at the plaintiff's premises. It was their conclusion that the fire was caused by arson. Moreover, the report alleged that the fire was started by an employee of the insured, at the request of one of its directors. On the basis of the report the insurance company declined to indemnify the claim. The director concerned was convicted of arson, however that decision was subsequently overturned.

It was pleaded that the investigators owed the plaintiff a duty of care in the preparation of their reports because they knew their reports would influence the defendant's decision whether to meet the claim. It was submitted that the investigators were aware, or ought to have been aware, that any refusal to cover the costs of the fire would create serious financial consequences for the plaintiff and its directors. The plaintiff also alleged that the investigators failed to exercise due care in the preparation of their reports, and as a consequence wrongly advised the insurance company.

A further cause of action in defamation was pleaded against the investigators.

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78 Supra at note 4, at 162.

79 Supra at note 17.

80 See generally Windett, "Risk, Loss, Negligence and Cause" (1993) 7 Auckland U L Rev 273; Windett, "Case Note: *South Pacific Manufacturing v New Zealand Security Consultants and Investigators Ltd: Mortenson v Laing*" (1992) 7 Auckland U L Rev 212; Todd, "Negligence Actions Against Insurance Investigators" (1992) 108 LQR 546.

This arose, in part, from a report to the police on the alleged cause of the fire.[81]

The original actions in negligence had been struck out by the High Court, leaving the only live issue before the Court of Appeal as a claim relating to loss of reputation and failure to indemnify. The Court held that because of the interface with defamation and qualified privilege, no duty of care was owed by the insurance investigators to the insured.

The Court of Appeal unanimously decided that *Murphy* should not lead to any change in the approach to negligence in New Zealand, preferring to retain an approach modelled on *Anns*. In addition, it was stated that regardless of the approach taken to determine the existence of a duty, the ultimate question ought to be whether it was *fair and reasonable* to impose a duty of a particular scope.[82]

It was also held that as defamation already provided a cause of action, notwithstanding the close proximity, it should be the proper avenue of redress, in the absence of special circumstances:[83]

> To allege that the investigator carelessly and incorrectly reported that an insured was responsible for the fire is to say that the investigator carelessly made a defamatory statement about the insured.

Furthermore it was open to the plaintiff to sue on the basis of contract.

The Court expressed concern that freedom of speech would suffer if an investigator could not rely on the defence of qualified privilege, arising from the contractual relationship with the insurer, in submitting the investigation report. On this point Cooke P stated:[84]

> Qualified privilege can be defeated by proof of malice, but not by proof of mere negligence. The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech that exists under the law worked out over many years to cover freedom of speech and its limitations. By a side wind the law of defamation would be overthrown .... To cut down the practical scope of the protection would run counter to public policy in this field.

The decision in *South Pacific Manufacturing* accords with the position taken in earlier New Zealand decisions on the merging of defamation with negligence. It is clear that the New Zealand approach to reconciling cases which have a tendency to overlap the torts of negligence and defamation is one of caution. The justification for rejecting claims for expansion of negligence into the tort of defamation has invariably fallen to be decided on the basis of policy and the protection of freedom of speech.

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81 Allegations of defamation and negligence were also made against all parties to the proceedings.

82 Supra at note 17, at 297 per Cooke P: "Whichever rubric is used, in the end it seems to me inescapable that the criterion being employed by the Courts is in the words of Lord Keith of Kinkel ... whether it is just and reasonable to uphold a duty of particular scope", referring to Lord Keith's observations in *Peabody*, supra at note 64.

83 Ibid, 309 per Cooke P.

84 Ibid, 302.

3. The House of Lords Reconsiders: *Spring v Guardian Assurance plc*[85]

(a) Background

Mr Spring was an employee with Guardian Royal Exchange Assurance ("GRE") and was responsible for selling insurance policies. It was discovered that he was planning to join a competitor and he was dismissed as a result. He then applied to become a representative of another insurance firm, Scottish Amicable. Both Scottish Amicable and GRE were members of the Life Assurance and Unit Trust Regulatory Organisation ("LAUTRO"). Under LAUTRO's code of conduct, Scottish Amicable was required to request a reference from GRE before Mr Spring could be appointed.[86] The rules further provided for "the full and frank disclosure of personnel details" in respect of employees shifting between members of the association.

The reference provided by GRE stated that Mr Spring was "a man of little or no integrity and could not be regarded as honest". It went on to say that he had ignored the concept of "best advice" and sold policies designed with the intention of bringing him the highest commission. At trial, Judge Lever QC was moved to remark on the reference, saying it was so strikingly bad as to amount to "the kiss of death" to his career in insurance.[87]

Mr Spring sued GRE for malicious falsehood, breach of contract and negligence in an attempt to recover the earnings he claimed were lost as a result of the unsubstantiated allegations. On the accuracy of the reference, the trial judge found that the plaintiff had been guilty of inexperience and incompetence, but not dishonesty or a lack of integrity. Furthermore, had reasonable care been taken, and a proper investigation undertaken, it would have been shown that Mr Spring was not dishonest. The trial judge went on to say that despite the failure of the defendant to carry out such an investigation, they had not acted with malice and genuinely believed in the truth of their allegations.

For malice to have been shown, the plaintiff would have had to prove that the defendant employer knew the statements to be false or was indifferent as to their falsity, or alternatively, that the statements were made out of personal spite or

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85 [1993] 2 All ER 273 (CA); [1994] 3 All ER 129 (HL).

86 The LAUTRO rules stated:

> "3.5 (1) A person shall not be appointed as a company representative of a member unless the member has first taken reasonable steps to satisfy itself that he is of good character and of the requisite aptitude and competence and *those steps shall ... include ... the taking up of a reference relating to character and experience.*
> (2) A member which receives an enquiry for a reference in respect of a person whom another member or appointed representative is proposing to appoint shall make full and frank disclosure of all relevant matters which are believed to be true to the other members or the representative."

See *Spring v Guardian Assurance Ltd plc*, supra at note 5, at 277.

87 *Spring v Guardian Assurance Ltd plc* [1992] IRLR 174.

some other improper motive. On the facts the plaintiff was unable to discharge the burden of proof and the action for malicious falsehood failed.

The allegation of breach of contract was founded on an implied term that the defendant would provide a reference which was "full, frank and truthful, and which was in any event prepared *using reasonable care*".[88] Both the trial judge and the Court of Appeal rejected the argument on the basis that such a term was not a necessary incident of the contract.[89]

The remaining cause of action was the plaintiff's claim based on negligent misstatement. The key issue to be resolved was whether GRE owed a duty of care to Mr Spring. The trial judge found that the defendant did indeed owe a duty of care and had breached the duty to prepare a reference that was truthful. Overturning on appeal, Glidewell LJ referred to *Bell-Booth Group* where it had been held that there could be no duty of care in negligence in cases where it would bypass the defence of qualified privilege in defamation. His Lordship was not persuaded to find a duty of care despite the fact that the statements made by GRE were untrue and the rules of LAUTRO required a reference to be given.

In the House of Lords, Lord Goff summarised the issues on appeal:[90]

> (1) Whether the person who provided the reference *prima facie* owed a duty of care, in contract or tort, to the other in relation to the preparation of the reference, and
>
> (2) If so, whether the existence of such a duty of care should be negatived because it would, if recognised, *pro tanto* undermine the policy underlying the defence of qualified privilege in the law of defamation.

Set against the background of the New Zealand decisions and its earlier decision in *Lawton*, the House of Lords had three clear options open to it:

(i) Adopt the lead taken by Tudor Evans J in *Lawton*, but clarify the source of principles establishing the existence of the duty of care as deriving incrementally from *Hedley Byrne*;

(ii) Apply *Murphy* to determine whether the imposition of a duty of care would be just and reasonable, there being no policy grounds to militate against its existence;

(iii) Adopt the dicta of Cooke P in *Bell-Booth Group* and *South Pacific Manufacturing*, concluding that the finding of a duty of care in negligence, although prima facie established, is negatived because of the encroachment into the field of defamation and the defence of qualified privilege.

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88 Ibid, 186 (emphasis added).

89 Relying on Lord Bridge in *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563.

90 Supra at note 1, at 143.

The fundamental and most persuasive element of this case involves an assessment of the importance of references in the modern workplace. Arguably, the Law Lords would have opted for the approach taken by Cooke P in *Bell-Booth Group* and *South Pacific Manufacturing*, if the value and relevance of such references had not been recognised. References were seen as representing a "significant interest" of the plaintiff, and their negligent preparation by the employer, in essence amounting to a wrongful transaction, as causing harm to the plaintiff.[91] In these circumstances, expansion of the tort of negligence was warranted, the question being how it could be achieved.[92]

(b) The Judgments

Lord Goff found that a duty of care was owed based on the assumption of responsibility for providing references by the employer, and reliance by the plaintiff on the exercise of due care and skill in their preparation.[93] Citing Lord Morris in *Hedley Byrne*, two critical elements were identified.[94]

(i) Foreseeability of loss; and
(ii) A special relationship contingent upon the possession of a special skill applied for the benefit of another and upon which the person relied.

He continued:[95]

> [I]t is my opinion that in cases such as the present the duty of care arises by reason of an assumption of responsibility by the employer to the employee in respect of the relevant reference, I can see no good reason why the duty to exercise due skill and care which rests upon the employer should be negatived because, if the plaintiff were instead to bring an action for damage to his reputation, he

91 Doulding and Mullender, supra at note 14.

92 See generally, Milmo, "Liability for References" (1994) 144 New LJ 1477; Allen, "Liability for References: Spring v Guardian Assurance" (1994) Mod LR 111; Downey, "The Duty of Care Again" (1994) NZLJ 273; Elwes, "References-How Far Can You Go?" (1993) 137 Sol J 1196; Thawley, "Duty to be Careful When Giving Employees References" (1996) 70 Aust LJ 403.

93 Supra at note 1, at 145. "[W]here the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct ... [and] ... it is true that the judge found that there was no contractual relationship between them and the plaintiff; but I am nevertheless satisfied that, on the *Hedley Byrne* principle, a duty of care would nevertheless arise in tort", ibid, 148.

94 Supra at note 5, at 594: "If someone possessed of a special skill undertakes ... to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise .... Furthermore, if ... [a] person is so placed that others could reasonably rely upon ... his skill or upon his ability to make careful inquiry [and] a person takes it upon himself to give information or advice to ... another person who, as he knows or should know, will place reliance on it, then a duty of care will arise."

95 Supra at note 1, at 151.

> would be met by the defence of qualified privilege which could only be defeated by proof of malice. It is not to be forgotten that the *Hedley Byrne* duty arises where there is a relationship which is, broadly speaking, either contractual or equivalent to contract. In these circumstances, I cannot see that principles of the law of defamation are of any relevance.

In defining the term "special skill", Lord Goff said it was "to be understood in a broad sense, certainly broad enough to embrace special knowledge",[96] and that an employer was possessed of such skill in relation to an employee.

In terms of whether the employee was entitled to rely upon the judicious use of such a skill, he stated that had the *Hedley Byrne* principle or a contractual term to that effect not applied, the appeal would have been dismissed on the basis that it would have been a simple case of the defendant having made a statement damaging to the plaintiff's reputation. Liability in negligence could not be applied consistently with the established laws of defamation and the defence of qualified privilege.[97]

Lord Goff found the facts in *Spring* were analogous to those of *Hedley Byrne*, and that recognition of a duty of care would not give rise to undue ill effects. Justice required the finding of a duty of care, and further, there were no policy considerations which should negative against such a finding.[98]

In his reasoning Lord Goff appears to have taken a two stage approach reminiscent of *Anns*, effectively going beyond the principles established in *Hedley Byrne*. However, he would find the duty of care only where there is a close analogy with a pre-existing category, in other words an incremental expansion. This reasoning is in conflict with the New Zealand position, where the finding of a duty of care is essentially a matter of policy in which pre-existing categories are helpful, rather than decisive, in determining whether a duty exists in a novel fact situation.

It appears, both on the facts and subsequent application, that the source of the duty justified, as derived from the principles of *Hedley Byrne*, is actually achieved only by a strained and somewhat unconvincing analogy with that case. Though the significant interest in need of protection is correctly identified, the approach taken in balancing that interest against public policy issues (namely defamation) suggests a wider incremental approach is being adopted.[99]

Lord Lowry approved Lord Goff's interpretation of *Hedley Byrne* while also making reference to the need of balancing the plaintiff's interests against policy concerns.[100] In terms of the way in which the balancing exercise was to be undertaken, he said:[101]

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96 Ibid.

97 Ibid, 144.

98 Ibid, 151.

99 See Allen, supra at note 92; Markesinis and Deakin, "The Random Elements of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy" (1992) 55 Mod LR 619; Doulding and Mullender, supra at note 14.

100 Supra at note 1, at 152.

101 Ibid, 153.

> I ... believe that the Courts in general and your Lordship's House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that *ex hypothesi* is a perfectly good cause of action.

Though it is difficult to categorise Lord Lowry's judgment, what seems clear is that he favours recovery on a wider basis than perhaps would have been considered in light of *Murphy*.

In contrast to the seemingly wide incremental approach advocated by Lords Goff and Lowry, Lords Slynn and Woolf openly acknowledged that in order for the plaintiff to recover, it would be necessary to create new liability rules:[102]

> [B]eing that there is no authority of your Lordships' House directly on point, it is open to your Lordships to decide the question as one of principle.
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> ....
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> The sole question ... is whether balancing all the factors "the situation should be one in which it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".

Although this approach differed in determining the existence of a duty of care, it was generally consistent with the wider approach, first and foremost identifying the significant interest and the context in which this interest was harmed.[103] Lord Woolf hypothesised:[104]

> [I]f an employer or former employer, by his failure to make proper inquiries causes loss to an employee, it is *fair, just and reasonable* that he should be under an obligation to compensate that employee for the consequences. This is the position if an employer injures his employee physically by failing to exercise reasonable care for his safety and I find it impossible to justify taking a different view where an employer, by giving an inaccurate reference about his employee, deprives an employee, possibly for a considerable period, of the means of earning his livelihood. The consequences of the employer's carelessness can be as great in the long term as causing the employee a serious injury.

Whilst freedom of speech was considered an important issue in the New Zealand cases it was succinctly disposed of by Lord Lowry:[105]

> Freedom of speech, rightly prized in all civilised societies, is not to be identified with freedom to defame maliciously or to damage negligently.

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102 Supra at note 1, at 159-161 per Lord Slynn. See also Lord Woolf at 170: "[T]heir Lordships are being asked to make a measured extension to the ambit of the laws of negligence".

103 Ibid, 161: "In the case of an employee or an ex-employee the damage is clearly foreseeable if a careless reference is given; there is as obvious a proximity of relationship in this context as can be imagined."

104 Supra at note 1, at 168-169 (emphasis added).

105 Ibid, 153.

The sole dissenting judgment was that of Lord Keith. Having satisfied himself that the plaintiff's claim met the requirements of *Caparo*, a narrower test for the duty of care than that used by the majority, he proceeded to invoke what, in essence, was the second limb of *Anns*.[106] Lord Keith's reliance on *Anns* is surprising given his role in leading the attack which eventually saw it overturned in *Murphy*. He concluded that because of the interference with defamation and the rules of qualified privilege:[107]

> If liability in negligence were to follow from a reference prepared without reasonable care, the same adverse consequences would flow as those sought to be guarded against by the defence of qualified privilege.

Essentially, Lord Keith adopted the arguments presented in the trilogy of New Zealand cases discussed earlier, resisting any merger of the tort of negligence with defamation. However, because it is arguable that the torts are designed to combat different evils, and it may be that Lord Keith's failure to accurately identify the interest claimed had affected his decision. In Lord Slynn's words:[108]

> The essence of a claim in defamation is that a person's reputation has been damaged; it may or not involve the loss of a job or economic loss. A claim that a reference has been given negligently is essentially based on the fact, not so much that the reputation has been damaged, as that a job, or an opportunity, has been lost.

What the House of Lords did was to create an exception to the rule of qualified privilege in defamation, inasmuch as it applies to the provision of references. The justification for the creation of an exception rests on policy. Because references now carry a high value for employees and prospective employers alike, it is just and reasonable that the law should adapt to provide comparative protection.

The legal doctrine for qualified privilege rests upon a "legal, social, or moral duty" to speak. The flexibility of the doctrine allows for both the inclusion and subsequent removal of protection where changes in value have occurred. Clearly, the House of Lords attached considerable importance to the provision of accurate and fair references as warranting exclusion from qualified privilege.

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106 Ibid, 136 per Lord Keith: "[I]n any event this is, in my opinion, a case in which the second stage of the test propounded by Lord Wilberforce in *Anns v Merton London Borough* ... properly comes into play."

107 Ibid, 137.

108 Ibid, 161 per Lord Slynn.

V: CONTRACTUAL OR TORTIOUS LIABILITY – REFERENCES AS AN IMPLIED TERM?

Spring has also opened up the possibility that the careful preparation of references could be an implied term of employment contracts. Lord Woolf saw the source of liability in *Spring* as contractual rather than tortious, noting that in the employment context "there has always been a considerable overlap between claims based on alleged breach of duty in contract and in tort".[109] Both Lord Goff and Lord Slynn concurred that in some circumstances the employer's duty of care in preparing a reference could be expressed as arising from an implied term of the contract, notwithstanding the absence of any legal obligation on the employer to provide a reference in the first instance:[110]

> Where the relationship between the parties is that of employer and employee, the duty of care could be expressed as arising from an implied term of the contract of employment .... Such a term may be implied despite the absence of any legal obligation on the employer to provide a reference ... and may be expressed to apply even after the employee has left his employment with the employer.

Despite recognition that employment contracts inherently contain a degree of uncertainty, there is no basis for drawing a distinction with other forms of contracts when it comes to determining implied terms.[111] In order to determine whether such a term could be implied, either the "business efficacy" test, as set out by the Privy Council in *BP Refinery Ltd v Hastings Shire Council*,[112] or "custom and practice" would need to be established. In accordance with *BP Refinery Ltd*, for a term to be implied it must be:[113]

(i) Reasonable and equitable;
(ii) Necessary to give business efficacy to the contract;
(iii) So obvious as to go without saying;
(iv) Capable of clear expression; and
(v) Not contradict the express terms of the contract.

Although arguments can be made in respect of each of these elements, proof of business efficacy will often present the greatest hurdle for any employee arguing for the provision of references as an implied term.

The alternative approach would be to argue a term implied by custom. For this

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109 Ibid, 167.
110 Ibid, 147 per Lord Goff.
111 See *AG v NZPPTA* [1992] 1 ERNZ 1163.
112 (1977) 52 ALJR 20.
113 Anderson, "Implied Terms" in *1996 Employment Law Conference* (1996) 21, 25. See also *Lister v Romford Ice Co* [1957] 1 All ER 125; *Sim v Rotherham MBC* [1986] 3 All ER 387.

to apply it would generally need to be shown that the term was so well known and acquiesced, that everyone making a contract in a particular situation could reasonably be presumed to have imported the term into the contract.[114] According to the leading case of *Whitcombe & Tombs Ltd v Taylor* the main criteria are that:[115]

(i) The custom must be general;
(ii) It must be reasonable;
(iii) It is not necessary that the custom be known as long as it is a prevailing custom in the relevant trade or district;
(iv) It must not be repugnant to an express term.

The test therefore is somewhat less onerous. In light of Lord Goff's comments in *Spring* that "references are part of the currency of the modern employment market",[116] it may be arguable that, at least for certain industries, the provision of references should be implied into individual contracts.

Although contractual liability adds nothing to the tortious liability deemed to exist in *Spring*, it may be concurrent with tort and to the same effect. As such, it offers another avenue for the New Zealand courts to explore, if the expansion of the principles of *Hedley Byrne* is deemed undesirable.[117]

VI: CONCLUSION

It may be argued that the House of Lords has effectively expanded the principles of *Hedley Byrne*, insofar as references for employment are concerned. Undoubtedly, the New Zealand courts will now have difficulty in continuing to resist narrowing the gap between negligence and defamation. The pressure is clearly on New Zealand to follow their lead in the face of a similar fact scenario. However, as Lord Keith observed, to do so would likely give rise to further uncertainty as to the scope of the duty of care under *Hedley Byrne*. The ramifications of *Anns* have well demonstrated the pitfalls that such a step may ultimately create.

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114 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Aust) Ltd* (1986) 160 CLR 226, 236.

115 (1908) 27 NZLR 237.

116 Supra at note 1, at 146.

117 It is noted that a range of broad obligations have in the past been implied into employment contracts including fair and reasonable treatment, *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, 383, and restraints on trade, *Tisco Ltd v Communication and Energy Workers Union* [1993] 2 ERNZ 779.

It seems that the decisive factor persuading the House of Lords to apply *Hedley Byrne* was recognition of the value of references. This was despite acknowledgment that the duty to supply references was generally to be considered only a "moral obligation",[118] or at best an implied term. In what was a policy decision, the House of Lords effectively recognised greater legal protection in order to address the serious harm found to arise from the giving of careless references.

There appears some strength to the argument that an expansion of the negligence identified in *Spring* should be for a limited class of acts, namely employer liability for inaccurate or unfair references. Such a limitation would, if adopted, potentially appease Lord Keith's concerns.

Determining whether a duty of care is owed where the torts of negligence and defamation conflict is a familiar task for the New Zealand courts. In each case to date, the decision has fallen to be decided on grounds of policy. It appears within reason that if the New Zealand courts accept the value ascribed to references in *Spring*, the outcome will be similar.[119]

If so, where does that leave the defence of qualified privilege? Though it may no longer serve to protect employers, in the House of Lords' view society would still wish to see protection extended to referees. Unlike employers, referees are chosen by the individual. It is therefore unlikely that they would volunteer negative information or act maliciously.[120] However, they may be overly praiseworthy, causing a new employer to hire an individual who may be unable to deliver the service required. In such cases loss may follow, although causation will remain a difficult element to prove.

In *Spring*, the House of Lords suggested that it would be appropriate to draw a distinction:[121]

> [I]t is immediately clear that a distinction can be drawn between cases where the subject of the reference is an employee ... or an ex-employee and where the relationship is social and has never been contractual. In the latter situation all that the person who is the subject of the reference may be able to rely on is the fact that the referee gave the reference. That I can well understand may not be considered sufficient to create the required degree of proximity. The proximity would be closer to *Hedley Byrne*, if the reference had been given by a purely social acquaintance at the request of the subject of the reference.

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118 Supra at note 1, at 161 per Lord Slynn.

119 This in turn raises a further jurisdictional issue under s 3 of the ECA. See Hughes, "Suing Employers for an Inaccurate Reference" (1994) ELB 115-116.

120 This will be all the more under control of the employee in the New Zealand context given the effect of the Privacy Principles contained in s 6 of the Privacy Act 1993. Only those referees whom the employee has authorised for contact may be approached. Any approach outside this may lead to a prima facie breach by the discloser/referee. For a discussion of the Privacy Act in the context of employment references, see "Hints on Job References" (1996) 10 *Private Word* 2 (purpose, use and collection); "References: Intentions Must be Clear" (1996) 12 *Private Word* 4 (scope, authorisation and access). Also, see generally Butterworths *Privacy Law and Practice* (1997) vols 1 and 2.

121 Supra at note 1, at 171 per Lord Woolf.

Lord Goff elaborated:[122]

> It must not however be thought that ... I am expressing any opinion upon the ordinary position where a person providing the reference simply seeks information from an outsider, and the outsider is negligent in relation to the supply to the referee of the information so requested. Indeed, in the absence of assumption of responsibility (under a contract or otherwise) by the outsider to the subject of the reference, there will ... be great difficulty in holding that there was any greater duty imposed upon him than that arising under the law of defamation.

The House of Lords clearly envisioned that an employee may only sue a referee in defamation, and that the referee could rely on the defence of qualified privilege. What remains is the scenario of a prospective employer seeking to sue a referee, representing a strict application of the principles of negligence derived from *Hedley Byrne* (although it is questionable whether the relationship is sufficiently equivalent to contract).[123]

It has also been suggested that protection could be achieved by finding that the giving of references is an implied term in employment contracts, but as noted this is not without limitations.

However, contract law might help avoid Lord Keith's concerns over the greater uncertainty if *Hedley Byrne* were applied. As discussed in Part II above, the creation of a duty of care, however justified, would arguably derogate from the traditional common law approach which provides some protection for employees with a less than perfect past. Whereas currently a potential employee need not produce a reference, the imposition of an implied term would make it difficult to explain why a reference was not being tendered. Employees would gain the right to a fair report on their employment record, but lose the ability to withhold negative information.

Furthermore, there is a danger that employers will react to the imposition of such a term by supplying pro forma references, where a form letter is generated based on what is on the personnel file, such as warnings, absences, bonuses and awards. In light of this it may be questionable whether it is desirable to recognise implied terms for the provision of references.

Though it may be premature to generalise such a term across the board to cover all contracts of employment, specific industries, particularly those involving professionals, may be in a good position to argue that custom has evolved to a point where such a step would be fair and reasonable. The obvious advantage in adopting this approach would be to leave *Hedley Byrne* as applicable to cases where prospective employers sue former employers.

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122 Ibid, 149.

123 Section 12 of the Fair Trading Act 1986 may, in limited circumstances, provide another means of bringing a cause of action.

Ultimately, employers must take greater care in the preparation of references. Much will turn on proof of causation, reliance, and the nature of the relationship between the author and recipient of the reference. Where it can be shown that a negligently prepared reference has cost an employee the opportunity of making a living, justice should compel the courts to provide a remedy.