

PROFESSIONAL RESPONSIBILITY: AN OVERVIEW

The Honourable Mr Justice Rogers

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INTRODUCTION

The last thirty years have witnessed an exponential increase in the width of liability of professionals. Only in this period did it become clear that a duty is owed by a professional not just to persons with whom there is a contractual relationship but also to some third parties. It is now accepted that liability may flow in respect of words negligently uttered causing purely economic loss. A cause of action may be located in contract or in tort and even for breach of fiduciary duty. The perception that concurrently a cause of action may be available to a client both in contract and in tort is a relatively recent arrival where the professional is not engaged in a common calling. A discussion of this evolution and the problems attending it may be a convenient central point around which an examination of some of the problems posed in this field of discourse may be treated. Since I wrote this paper there has been published a most perceptive analysis of many of these problems in an article by Mason QC, "Contract and Tort; Looking Across the Boundary from the Side of Contract" (61 ALJ 228).

CONCURRENT DUTY IN CONTRACT AND IN TORT

Until the last decade or so, it was generally accepted and, it would appear, mistakenly so, that, apart from the duty

owed by a professional person to a client arising from contract, there was no duty in tort (Groom v Crocker [1939] 1 KB 194). The contrary view was recognised in England in the judgment of Lord Denning MR in Esso Petroleum Co Limited v Marton [1976] QB 801 at 809. The validity of the earlier perception was then thought to be conclusively and finally exploded in England by Oliver J in Midland Bank Trust Co Limited v Hett Stubbs & Kemp [1979] 1 Ch 384. As his Lordship demonstrated, the decision in Groom v Crocker (supra) could not hope to survive the judgments in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465. It defied logic and common sense that a professional person should be held liable in tort to persons with whom he had no contractual relationship, say a solicitor acting gratuitously, but not liable in tort for the self same act of negligence to a client with whom there is a contractual relationship.

The acceptance of the existence of a dual obligation has had a tortured history in countries drawing on English jurisprudence.

In New Zealand, in McLaren Raycroft & co v Fletcher Development Co Limited [1973] 2 NZLR 100 it was held that an action for professional negligence between client and solicitor lay only in contract. In Gartside v Sheffield [1981] 2 NZLR at 553, 554 Thorpe J was not entirely convinced and the decision was questioned in Rowe v Turner

Hopkins & Partners [1982] 1 NZLR 178. The Court of Appeal referred to McLaren Raycroft as requiring reconsideration. In Allied Finance v Haddow & Co [1983] NZLR 22, the Court of Appeal seems to have accepted without expressly deciding that a solicitor owed a duty of care to his client in tort (see McMullen J at 34, 35). It would seem likely that when the time comes for the issue to be squarely faced that concurrent liability will be accepted.

By majority, the Full Court in Queensland in Aluminium Products (Qld) Pty Limited v Hill 1981 Qd R 33 accepted the reasoning of Oliver J. There was, however, a very penetrating and exhaustive review of the authorities by the dissentient, Connolly J. He rejected the statement by Denning MR in Esso Petroleum (supra) that decisions of the last century supported the notion of the existence of concurrent duties in contract and in tort. In Victoria, Oliver J's view was followed by the majority (Murphy J dissenting) in Macpherson Kelley v Kevin J Prunty & Associates [1983] 1 VR 573.

In the New South Wales Court of Appeal, in Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322, Hutley JA expressed his preference for the rule in Groom v Crocker but Samuels JA concluded that the question was still open. In New South Wales it seemed that the battle was won after the decision of the Court of Appeal in Brickhill v Cooke [1984] 3 NSWLR 396. The judgment of the Court was delivered by

Glass JA and he was of the opinion that an engineer could be sued by his client both in contract and in tort. As Glass JA said at p 401:

"Since doctors and dentists have always been subject to a dual liability in tort and contract one would suppose that the ruling in Groom v Crocker was influenced by the belief that a plaintiff able to prove financial loss only could not succeed in negligence."

However, in Hawkins v Clayton [1986] 5 NSWLR 109 the Court of Appeal again left open the question whether there were concurrent duties in contract and in tort owed to the plaintiff. The High Court granted special leave to appeal and judgment has been reserved.

In South Australia, the Full Court adapted the modern view in Sacca v Adam & R Stuart Nominees Pty Limited (1983) 33 SASR 429.

The Supreme Court of Ireland accepted the new principle with the pungent comment: "For the same default there should be the same cause of action (Finlay v Murtagh 1979 IR 249 at 257).

In Canada, also, after a false start in J Nunes Diamonds Limited v Dominion Electric Protection Co (1972) 26 DLR (3d) 699 the Supreme Court has in Central Trust Co v Rafuse (1987) 31 DLR (4th) 481 decisively come down in favour of the existence of a concurrent liability. The summary of principle (supra p 521-522) deserves to be quoted at least

in part:

"What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence."

What courts have not yet resolved are the difficult questions which follow from such acceptance. The existence of a concurrent duty has been said to impact in a number of different areas. Differences can arise depending on whether the action is laid in contract or in tort in a number of respects.

There is great good sense in the words of the Supreme Court

of Canada in Central Trust Co v Rafuse (supra) where Le Dain J, delivering the judgment of the Court, said (p 489):

"The three most important areas in which these differences have been reflected in the decisions on the question of concurrent liability are limitation of actions, measure of damages and apportionment of liability. Although there has been an increasing judicial disposition to apply similar rules, or at least to reach similar results, with respect to these issues under the two kinds of liability, there are likely to remain differences of result in certain cases flowing from inherent differences between contract and tort. Although an assimilation of the rules or results under the two kinds of liability has been advocated as one response to the issue of concurrent liability, the question is unlikely to be rendered wholly academic by this clearly discernible development in the law. It has been the important difference of result, particularly in the three areas referred to, that has given the question of concurrent liability its policy focus and interest in the abundant judicial and academic opinion on the subject."

The most frequent question so far has probably been the easiest to accommodate. Plaintiffs have been permitted to sue their erstwhile professional advisers in tort thereby postponing the commencement of the limitation period. That question was the occasion for the seminal judgment of Oliver J in Midland Bank (supra). However, even in this relatively uncomplicated field the courts have not been comfortable.

SCOPE OF DUTY

The threshold problem confronting those accepting the notion of concurrent liability relates to the scope of duty in tort. As Le Dain J pointed out, a tortious duty of care will not spring from specific obligations created by express terms of a contract. A duty of care in tort might be co-

extensive with duty arising from an implied term of a contract. In theory, it is possible to imagine an express term of a contract for an audit that requires the auditor to discharge his duties with all due care and skill. In actual practice, the statement of principle by Le Dain J is accurate.

It would have been just as irrational to allow unrestricted liability in tort without reference to contractual obligations as it was to deny altogether the availability of a tortious remedy. This was clearly and emphatically recognised by Lord Goff, then still a member of the Court of Appeal, in Leigh & Sillivan Limited v Aliakmon Shipping Co Limited [1985] 1 QB 350. Indeed, as his Lordship made clear, rather than to permit a result which allowed for liability unrestricted by contract, he would prefer to reject altogether the notion of liability in tort. The facts were most unusual. The buyer of goods sued the owners of a vessel, that was under a time charter, for the loss caused by damage to the goods as the result of bad stowage. Lord Brandon explained in the House of Lords ([1986] 1 AC 785) that the parties had changed the ordinary c and f contract so that the sale was ex warehouse but the risk in the goods during their carriage by sea remained with the buyers as if the sale had a c and f basis. The Court of Appeal held that the buyers did not have a right of action in contract against the shipowners because ownership had not passed to the buyers as required by the Bills of Lading Act

and that there was no implied contract with the shipowners arising from the buyers having taken delivery of the goods upon presentation of the bill of lading because the buyers did so as the agents of the sellers under their agreement with the latter. A majority of the Court held that the buyers did not have a right of action in tort against the shipowners because they were not the owners and did not have a right to immediate possession of the goods at the time the damage occurred. The majority gave as a further consideration that to admit a liability in tort in such a case would be to impose on the shipowners a greater liability than they had under the Hague Rules in the contract of carriage. The majority were of the view that, as a matter of legal principle, a tortious duty of care in such a case could not be made subject to the contractual provisions limiting liability. I am not sure that I understand what principle it is that would be violated. Why may the duty not be imposed in tort subject to the restriction imposed by the parties? Tortious liability could still have an important role to play, eg with respect to the limitation of action.

Robert Goff LJ, who was the dissentient in the Court of Appeal, and whose approach to the problem was rejected by the House of Lords, sent out this warning (p 396):

"This is therefore a case where, if the buyers are to have a direct right of action against the shipowners, they will do so by reason of a breach of duty owed by the shipowners to the goods' owner in respect of the care of goods entrusted to them for carriage under a contract contained in or evidenced

by a bill of lading. Indeed the case can be simplified into one in which A breaks his duty to B, and the question is whether a third party, C, can proceed directly against A in respect of damage thereby suffered by him. In such circumstances (and in this I find myself differing from Lloyd J in The Irene's Success [1982] QB 461) it seems to me unthinkable that, if C is to have a direct cause of action against A, that right of action should be uncontrolled by those provisions which regulate A's liability to B. This is a reaction which, I consider, is felt particularly strongly in a case concerned with carriage of goods by sea. The vast majority of goods carried by sea are carried under bills of lading which incorporate, usually compulsorily, but if not compulsorily then by agreement, the Hague Rules; even in cases where the bill of lading remains a mere receipt, and the goods are carried under the terms of a charterparty, it is not unusual for the charterparty itself to incorporate the Hague Rules. It would be a most remarkable result if a shipowner were to contract to carry goods under a bill of lading incorporating the internationally accepted regimen embodied in the Hague Rules, and were then to find himself faced with a claim in tort for economic loss arising from damage to the goods in transit, brought by a receiver who was never party to the contract of carriage or owner of the goods while in transit, and who was able to prosecute his claim uninhibited by the provisions and exceptions in the bill of lading. If that were so, he could (for example) claim such damages on the basis of negligence of the master in the navigation of the ship; he could commence proceedings at any time up to six years after the date when the damage occurred; and he could assess his claim unrestricted by the limitation as to amount contained in the Hague Rules. If I were forced to conclude that the buyers in the present case, if able to proceed directly against the shipowners, could do so in that manner, I would unhesitatingly reject their argument."

However, Goff LJ took the view, and I suggest correctly, that there was no principle that stood in the way of his preferred approach. The same view was taken by Samuels JA in Bright v Sampson & Duncan Pty Limited [1985] 1 NSWLR 346 at 356.

Nonetheless, it is doubtful whether, at least in England, the law will develop along these lines. In Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited [1986] 1 AC 80 the Privy Council said (p 107):

"Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in Lister v Romford Ice and Cold Storage Co Limited [1957] AC 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at p 587:

'Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.'

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in Macmillan [1918] AC 777 and Greenwood [1933] AC 51 can be implied into the banking contract in the absence of express terms to that effect, the banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted."

It is indeed difficult to know how far their Lordships were intending to go. It seems unlikely in the extreme that they were intending to cast doubt on the correctness of the judgment of Oliver J in Midland Bank (supra) without ever addressing that decision in terms or indeed the decisions that followed it. The question of principle referred to does not generally arise because as a rule parties do not in their contract specifically advert to the particular obligation in question. The fact that different consequences may follow may improve the fairness of the result. The instance of limitation of actions is particularly unfortunate in that context as demonstrated by the facts of Midland Bank (supra) itself as well as Central Trust (supra) and numerous other decisions.

DISTRIBUTION OF LOSSES

The preponderance of judicial opinion favours the view that contributory negligence cannot be relied upon where the only action brought and the only cause of action is in contract

(cf Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1983) 55 ALJ 278 p 283 et seq).

But what of the situation where the plaintiffs sue in both contract and in tort? The question has not been finally resolved. In England the answer at the present is thought to be in the negative (cf Basildon District Council v J E Lesser (Properties) Limited [1985] 1 QB 839; A B Marinetrans v Comet Shipping Co Limited [1985] 3 AER 442. Nonetheless, the argument to the contrary does not lack supporters. Hobhouse J in Forsikring saktieselskapet Vesta v Butcher [1986] 2 AER 488 not only took the view that the defence is available but claimed to have the support of the English Court of Appeal in Sayers v Harlow UDC [1958] 2 AER 342 for his conclusion. Hobhouse J in turn was followed by Allcott J in Lipkin Gorman v Karpnale Limited (1986) 136 NLJ 659. Each school has its academic supporters (cf 1986 CLJ 8 but contrast [1987] 1 LMCLQ 10). It would seem that textually the legislation will yield to either interpretation and ultimately the question will be resolved as a matter of policy. Indeed, that is how the question has been dealt with in Canada.

In Canadian Western Natural Gas Co v Pathfinder Surveys Ltd (1983) 12 Alta (2d) 135, the Alberta Court of Appeal held that the plaintiff could not frame an action in contract rather than in tort so as to avoid the application of

apportionment legislation. The Court took the view that, to avoid injustice in a case of concurrent liability, the action should be treated as an action in tort. Quite imaginatively, two other provincial Courts of Appeal in Canada have applied apportionment in contractual actions treating the principle of apportionment as part of the common law: Cosyns v Smith (1983) 146 DLR (3d) 622 and Doiron v La Caisse Populaire D'Inkerman Ltee (1985) 17 DLR (4th) 660. The judgment of the New Brunswick Court of Appeal in the last mentioned case was delivered by La Forest JA, then a member of that Court. He recognised that decisions supporting apportionment employed reasoning "sparse to the point of non-existence" (p 675) and that historically it was inappropriate to rely on the provisions of the contribution legislation. He also acknowledged (p 676) that the decisions relied upon by Professor Glanville Williams in "Joint Torts and Contributory Negligence" do not support the applicability of principles of contribution. He said (p 677) that equally there was neither authority nor underlying principle which required the extension into contract law of the absolutist tort theory for distribution of loss. He identified the origin of the rule in tort in the ethos of the 19th century. He went on (p 679):

"As 19th century judges responded to the ethos of their times, so must we to ours. Contribution is now consistent with prevailing theories of both the law and the market-place. And it meets our sense of fairness. In many situations, the fairest approach is to apply the now ordinary rules of contributory negligence. That is what the courts are asserting when they say that it is 'right'."

Fairness and justice are the concepts which ground the views of another division of the Court of Appeal of New Brunswick in Coopers & Lybrand v H E Kane Agencies Limited (1985) 17 DLR (4th) 695 in holding that apportionment applies. Of course, if this be a correct approach, then apportionment should be available across the field, even in actions purely in contract.

In Australia, in Meddick v Cotten (1984) 36 SASR 542, the trial judge held that contributory negligence had not been proved. However, White J went on to discuss the availability of the defence of contributory negligence and apportionment should his finding be disturbed.

Most recently, the authorities were reviewed by Bollen J in the Supreme Court of South Australia in Walker v Hungerfords (24 February 1986, unreported) and His Honour concluded that contributory negligence and apportionment were available. He also found that there was no negligence and, accordingly, his opinion was merely by way of obiter.

Probably the most that can be said is to echo the words of Samuels JA in Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322 that the point remains open and arguable.

The question is discussed at length by Greig and Davis in their recent book "The Law of Contract" (1978) p 1403 et seq. The authors express the view (p 1405) that:

"The weight of authority favours the view that in these circumstances (that is where there are concurrent and co-extensive obligations in contract and in tort) the defendant may plead the apportionment legislation as a defence whichever way the plaintiff may have framed his cause of action".

This is certainly the view which most closely accords with fairness. In the same way that it would be unjust to allow an action in tort, unfettered by the limitations which would be encountered in an action in contract and based on the terms of the contract, it would be unjust to allow apportionment to be avoided by resort to an action in contract. It has been argued that, if the courts fail to give this result, there should be legislation (M B Taggart "Contributory Negligence; Is the Law of Contract Relevant" (1977) 3 Auck L Rev 1).

The foregoing discussion serves to introduce what, in my view, are the really difficult questions in this area. I may best commence by posing one of the most common manifestations. An auditor fails to discover defalcations of a company accountant and they continue for a number of years. The company sues the auditors who seek to rely on the contributory negligence of the company and, as well, claim contribution or indemnity from the directors who, it is said, failed to adequately supervise the accountant.

Generally, the courts have set their face against holding that there was contributory negligence in such

circumstances. As Samuels JA said in Simonius Vischer (supra p 348) when invited to find implied terms in the audit contract importing obligations on the part of the client:

"Such provisions would necessarily have as their primary effect the weakening of the obligations to supervise and examine and of the auditor's duty to make up his own mind all of which are central to the very notion of an audit contract."

Jacobs JA spoke to the same effect in Dominion Freeholders Limited v Aird [1966] 2 NSWLR 293, 298.

The contrary result was arrived at after a very thorough survey of United States, Canadian and Australian authorities by the Chief Justice of British Columbia in Revelstoke Credit Union v Miller, Berry [1984] 2 WWR 297. However, he drew the line where the directors were acting dishonestly. Surely the sentiments expressed by Samuels JA should prevail. Were it otherwise, the purpose and effect of the audit contract would be set at nought.

What then of the situation where the auditor seeks to join the directors as third parties? Putting aside the technical difficulties which may be posed by the form of the contribution legislation requiring liability in tort whereas the principal action may be framed in contract, why should there not be an entitlement to contribution? In Leeds & Northrop Australia v Electricity Commission of NSW (NSW Court of Appeal, 4 May 1973), the Court declined to dismiss summarily a cross claim seeking such contribution. The

Court said:

"This view, which is the one favoured by Glanville Williams, cannot be said to be clearly wrong. Indeed, in our opinion, it is a view which is well open, and it certainly produces a more just result than a construction, which, in the cases under consideration, leaves the right to contribution dependent upon the manner in which the plaintiff happens to have framed his cause of action."

The dispute was then settled.

The same course was taken by Sheppard J in Employers Corporate Investments v Cameron 1977 CLC 40-365. He refused to strike out the cross claim by the auditors against the directors. Indeed, he said that in his tentative view the cross claimants were entitled as a matter of law to contribution. Unfortunately for the development of the law, this dispute also was then settled. In some countries, legislation has been passed to put beyond doubt the entitlement to contribution in such circumstances (eg Civil Liability (Contribution) Act 1978 (UK), but for a criticism see (1979) 42 MLR 182). Take Cambridge Credit Corporation Limited v Alexander (infra). Why should the auditors, if they are ultimately liable, not be entitled to transfer most of the loss to the directors who brought about the financial downfall of the company?

I should like to diverge somewhat now to follow up the major policy issue which underlies the query just posed. In Cambridge Credit the auditor was required to certify that the prescribed ratio between assets and debentures was maintained. Due to some imaginative work on the part of the

directors, the value of assets was brought in at a grossly inflated figure. I found that the auditors were negligent in accepting what they were told by the directors with respect to assets and their values. As it happens, the directors were not worth suing and, no doubt in a large measure for that reason, no effort was made by the auditors to seek indemnity or contribution from them. Even if they had been sued and the auditors succeeded, victory would have tasted sour.

Is an order for indemnity or contribution against the actual or major wrongdoer a sufficient and proper remedy to professional persons? What prompts the enquiry is the inability of professionals to obtain liability insurance at all, much less at an affordable premium, in respect of the liability to which they are currently seen to be exposed. Concepts of fairness are hardly satisfied by the panaceas currently on offer of limited liability by incorporation or by capping of damages. Consideration should perhaps be given to legislation proposed for The Netherlands where the judge will have power to apportion the primary liability between auditor and company officers without entering judgment against the auditor for the full amount.

I should warn against regarding the type of claim in Cambridge as confined to auditors. Other examples of claims of this kind we are presently witnessing are the rash of litigation arising from two major areas of recent activity.

However, the breach of ratio went undetected, no receiver was appointed, further debentures were issued and other assets acquired. Only towards the conclusion of the defendants' evidence as to this confined area of the company's operations did it emerge that the major contention would be that it was the restriction on credit imposed by the Commonwealth Government in 1974 that brought about the collapse of the company. Indeed, it appeared on the defendants' evidence that, in the period intervening between the auditor's initial default in 1971 and the credit squeeze of 1974, the financial position of the company had strengthened. The plaintiff declined my invitation to adduce evidence in reply. It adopted this course because of the view which it formulated as to the applicable law and which it still maintains. The effect of that view is that, once the breach of duty occurred and, due to that breach, the company was permitted to remain in business, the auditors were in truth insurers. As Mahoney JA said:

"Thus, the breach allowed the company to continue in business. If its net worth had fallen because, eg, the main buildings it owned had been destroyed by an earthquake, I do not think that that loss would have been causally related to the breach which let the company continue in business.

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To allow the company to continue in existence is, in a sense, to expose it to all of the dangers of being in existence. But allowing the company to remain in existence does not, without more, cause losses from anything which is, in that sense, a danger incident to existing. There are some dangers loss from which will raise causal considerations and some will not. But the company's case has been conducted on the basis that there is not to be - and there has in fact not been - a detailed examination of what particular things caused the fall in net value of the company between 1971 and 1974 and the nature for this

First, the widespread marketing of taxation schemes which may even have been soundly based but were incompetently, or sometimes dishonestly, implemented. Second, the high interest rates which obtained led both borrowers and financial advisers into foreign currency transactions which both were incompetent to manage. The consequential losses in some cases have been quite catastrophic in their results. There are in the pipeline actions for hundreds of millions of dollars against accountants acting as tax advisers and financial consultants against banks and other financiers. This leads me conveniently to the next topic I should like to discuss.

CAUSATION AND REMOTENESS

The difficulties encapsulated by these two words are well illustrated by what happened in Cambridge Credit Corporation Limited v Hutcheson (1985) 9 ACLR 545 (on appeal, Court of Appeal, unreported, 25 June 1987). In an effort to make the hearing manageable, I focussed first on a relatively small segment of the company's assets and activities and on the first only of the audits, that for the year ended 30 June 1971. I came to the conclusion that the auditor's failures led to a breach of the prescribed ratio of assets to borrowings. I was satisfied that, had the auditor drawn attention to the breach, the Trustee for the debenture holders would have appointed a receiver then and there. It was agreed by the parties that, at that time, the assets would have all but satisfied the debenture holders' claims.

However, the breach of ratio went undetected, no receiver was appointed, further debentures were issued and other assets acquired. Only towards the conclusion of the defendants' evidence as to this confined area of the company's operations did it emerge that the major contention would be that it was the restriction on credit imposed by the Commonwealth Government in 1974 that brought about the collapse of the company. Indeed, it appeared on the defendants' evidence that, in the period intervening between the auditor's initial default in 1971 and the credit squeeze of 1974, the financial position of the company had strengthened. The plaintiff declined my invitation to adduce evidence in reply. It adopted this course because of the view which it formulated as to the applicable law and which it still maintains. The effect of that view is that, once the breach of duty occurred and, due to that breach, the company was permitted to remain in business, the auditors were in truth insurers. As Mahoney JA said:

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purpose of them."

No matter what the company did, no matter how foolish the enterprise into which it may have ventured, any loss incurred would be to the account of the auditors. Counsel for the plaintiffs accepted that, in his argument, if the company had left the field of real estate completely and invested the whole of its assets in the futures market and lost the whole of its assets it would be entitled to be recompensed. I rejected this approach to causation and remoteness but the submissions were repeated in the Court of Appeal and suffered the same fate and no doubt in the fullness of time will be ventilated in the High Court. The rationale advanced by the plaintiffs is that what occurred was precisely what the defendants were engaged to safeguard against. The company was permitted to continue to trade in a financial condition which was prohibited by the Trust Deed. Any loss from whatever cause that was suffered due to the subsequent trading was caused by the initial negligence of the defendants and was not too remote. On a resumed hearing, the plaintiffs did call further evidence and demonstrated, at least to my satisfaction, that the breach in ratio subsisted right up to the time of the credit squeeze and the collapse of the company was simply a question of time. The credit squeeze was only the occasion for the collapse of the company and not its real cause.

It is this aspect of the decision which, to my mind, is

insufficiently understood by those who go into catatonic shock whenever Cambridge Credit is mentioned. The default in ratio was never rectified in the three years following the initial breach of duty. This led to an interesting submission from the defendants. They contended that the effect of their 1971 breach, if any, was spent when the accounts were audited for 1972 and subsequent years. It is an argument entitled to respect. Its force may best be illustrated by asking what would have happened had the defendants' retainer been terminated after the 1971 accounts were audited and the new auditors for the 1972 accounts also failed to detect the breach of notice? It was argued, therefore, that damages could be assessed in respect of the breach relating to the 1971 accounts by reference only to the financial position as it was in 1972. This, it was said, is for two reasons. First, because, at the time the contract was entered into, it was not reasonably foreseeable that the breaches of ratio would continue undetected or, alternatively, because damage in 1974 was not in the contemplation of the parties at the time of making of the contract. (As to other possible criteria, Koufos v Czarnikow Limited [1969] 1 AC 350.) It seemed to me that, if the breach escaped detection in 1971, there was no reason to think, or it was not unlikely, that history might repeat itself, as indeed it did, in subsequent years.

The plaintiffs did not seek to support the approach that I made to the case when it came before the Court of Appeal.

As a result, the Court dealt with the plaintiffs' loss theory I have already mentioned.

One of the principal features of the judgments of both Glass JA, the dissentient, and McHugh JA, one of the majority, is their acceptance of the "but for" test as the test of causation. One of the interesting features of the analysis by Glass JA is that every decision but one mentioned in relation to causation and remoteness was given in proceedings in tort.

Reverting to the earlier discussion, the House of Lords accepted in Koufos (supra) that the test of remoteness in contract was different from that in tort. What then is the test to be applied where there is a concurrent duty in contract and in tort. The decision in H Parsons (Livestock) Limited v Uttley Ingham & Co Limited [1978] QB 791 suggest that whatever way the plaintiff frames his case, the more favourable test will be applied.

FIDUCIARY DUTY

Actions against professionals have tended to be brought almost exclusively in contract, sometimes in tort, but hardly ever for breach of fiduciary duty. Yet fiduciary relationships exist where one person stands in a special relationship of trust, reliance and confidence to another person, based, inter alia, on inequality of experience. One would think that this is the badge of the usual relationship

of professional adviser and client. Today, one can detect signs of significant increase in the sheer number of actions against professionals for breach of fiduciary duty (Farrington v Rowe McBride & Partners [1985] 1 NZLR 83; Mid Northern Fertilizers Limited and anor v Connell Lamb Gerard & Co (Thorpe J, 18 September 1986). One of the reasons, I would suggest, is the measure of damages available to a successful plaintiff. The other and even more significant advantage is the ability to obtain damages from other participants in the transaction involved in the breach of fiduciary duty. Let me illustrate with the facts of Catt v Marac Australia Limited. Mr Winter is an accountant. He had a practice which concentrated almost exclusively on marketing tax postponement schemes to persons with high incomes, usually doctors. One type of scheme involved a company, Wings, which had a number of aircraft on order from Short Bros in Northern Ireland. Winter was engaged for a commission of \$A200,000 - 300,000 to form syndicates to acquire on lease individual aircraft. Winter marketed participation in the syndicate amongst his doctor clients. They trusted him and relied on his advice. Winter failed to inform members of the syndicate of his commission or that Wings was making a profit on the transaction running into hundreds of thousands of dollars. Thus, the total lease payments, being the whole of the price, even without interest payable by the syndicate, far exceeded the actual market value of the aircraft. It was proved that, at the time of acquisition of the aircraft, Marac and the other

financiers were aware that Winter was obtaining a commission without the knowledge of his clients, the members of the syndicate, and that he also concealed from them the difference in the purchase price payable by Wings to Short Bros and by the syndicate to Wings. It was found that Marac had actively participated in the transaction and made the breaches of fiduciary duty possible. Financially, it would have been unrewarding to sue either Winter or Wings. However, the financiers were also made defendants in the various actions and equitable damages sought from them. Not only did the syndicates succeed at first instance in having the transaction with the financiers set aside, their guarantees of the lease payments rescinded, but they also recovered by way of equitable damages the moneys they had already paid under the lease agreements. The principle is clear enough: the beneficiary of the duty is entitled to be put back in the position he would have been in. That is unburdened by the lease. The financier finishes up with a second hand aircraft. Interestingly, in Marac, contributory negligence was not pleaded and, accordingly, the problem in Day v Mead (1987 NZ Recent Law 1) did not arise. In Banque Paribas, where it was pleaded, the defendant settled. The appeals in Marac have now also been settled.

LIABILITY FOR ECONOMIC LOSS SUFFERED BY THIRD PARTIES

There is universal agreement that in some cases there will be liability outside the law of contract for negligent statements causing economic loss. Negligently prepared

valuations and accounts are ready examples. We are the fascinated witnesses of the efforts of the House of Lords on the one hand and the High Court of Australia on the other to define the boundaries of liability. The topic of course is so large that one can merely skim the surface of the debate.

The High Court sees the relevant test for determining the existence of a duty of care entirely in the relationship of proximity (Sutherland Shire Council v Heyman (1985) 157 CLR 424; San Sebastian Pty Limited v Minister (1987) 61 ALJR 41). The joint judgment in the second case cited offered this assistance (p 45):

"When the economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity ... but when the economic loss results from a negligent act or omission outside the realm of negligent misstatement, the element of reliance may not be present."

The test of liability proffered by Lord Wilberforce in Anns v Merton London Borough Council [1978] AC 728 held sway in England, Canada and New Zealand. It works in two stages. First, one determines whether, as between wrongdoer and injured party, there is a sufficient proximity such that, in the reasonable contemplation of the wrongdoer, carelessness "may be likely to cause damage" to the injured person. If that requirement is satisfied then, secondly, regard is had to any considerations which ought to negative or limit liability. Not only is this test difficult to apply but it

has come under heavy challenge recently. Most recently, the Privy Council pointed out in Yuen Kun Yeu v Attorney General of Hong Kong (unreported, 10 June 1987) that "for the future it should be recognised that the two stage test in Anns was not to be regarded as in all circumstances a suitable guide to the existence of a duty of care".

In Leigh & Sillivan Limited v Aliakmon Shipping Co Limited [1985] 1 QB 350, Goff LJ returned to the concept that such duty was based on an "assumption of responsibility by the defendant to the plaintiff in circumstances which were equivalent to contract". It would seem that in The Royal Bank Trust Co (Trinidad) Limited v Pampellone [1987] 1 Ll Rep 218 Lord Goff, delivering the judgment of the majority of the Privy Council, again fixed on the principle of assumption of liability rather than imposition of a duty as a result of a relationship of proximity or foresight. The minority opinion of Lord Templeman and Sir Robin Cooke accepted the view that a duty of care arose when Mr Kennedy, a bank manager, supplied financial information to the respondent, an unsophisticated person with little, if any, financial knowledge. As they said:

"If Mr Kennedy failed to appreciate the significance of the enquiry nevertheless Mr Kennedy had no right to assume that Mr Pampellone would understand the relevance of information contained in, or omitted from, the Pinnock brochure".

The distinction drawn by the majority of the Privy Council between giving information on the one hand and advice on the

other is flatly denied by the High Court in Heyman (supra). More importantly, in that decision, and since, the High Court has firmly rejected the Wilberforce test in Anns. In Australia the future seems to lie in the test of proximity as it is continuously refined by Deane J. It embraces physical proximity, in the sense of space and time between the person or property of the plaintiff and the person or property of the defendant; circumstantial proximity such as relationships eg employer and employee; and causal proximity addressing the relationship between act or statement on the one hand and the loss or injury on the other. It may reflect an assumption of responsibility by one or reliance by the other that care would be taken where the other party knew or ought to have known of the reliance. Thus, Deane J seeks to couple both the notions of proximity and reliance in the one definition of duty. The statement of law in England seems to be in a much greater state of flux.

DISCLAIMERS

Even before the decision in Hedley Byrne (supra) and the more expansive view of concurrent liability in contract and in tort was adopted, it had been usual to insert in documents such as valuations, advice from banks and other professional and quasi-professional communications disclaimers of liability should the information turn out to be incorrect. However, with the ever increasing scope of liability on the part of the professional persons, obviously the function of disclaimers has become one of increasing importance.

In Hedley Byrne (supra), Lord Reid contrasted disclaimer clauses in contracts, where it was necessary to exclude liability for negligence, and the disclaimer in the case before him, where the question was whether an undertaking to assume a duty to take care could be inferred. That is clearly a very different matter. Lord Morris took the view (p 504) that the bank effectively disclaimed any assumption of a duty of care. As he said:

"They stated that they only responded to the enquiry on the basis that their reply was without responsibility. If the enquirers chose to receive and act upon the reply, they cannot disregard the definite terms upon which it was given."

Lord Devlin (p 533) agreed with Lord Reid that:

"A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake."

Lord Pearce would have taken the view (p 540) that, even if the parties were already in contractual or other special relationship, the words would have given immunity to a negligent answer. In any event, in His Lordship's view, they clearly prevented a special relationship from arising:

"They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. Both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability. I do not find it possible to say that a liability was assumed."

In the interests of the development of the law it was unfortunate that the decision of Wootten J in BT Australia Limited v Raine & Horne Pty Limited [1983] 3 NSWLR 221 was not taken further. The defendant there prepared a valuation which contained a disclaimer clause in the following terms:

"This report is for the use of the party to whom it is addressed and for no other purpose and no responsibility is accepted to any third party for the whole or part of the contents of this report."

His Honour took the view that leaving aside the effect of the disclaimer, the valuer should be taken to have assumed responsibility to the plaintiff to take reasonable care in the valuation. So far as the disclaimer was concerned, His Honour's view was that (p 236):

"The disclaimer clause was unilaterally framed and inserted by Raine & Horne and if it was intended to disclaim responsibility for the consequences of its use for the very purpose for which it was obtained, it was reasonable to expect Raine & Horne to say so in clear words."

His Honour commented that he bore in mind the statement, particularly of Lord Reid in Hedley Byrne that no liability could be inferred but went on (p 237):

"While in the present case the contractual liability would not extend to third parties, the obligation to provide the valuation was being undertaken in a contractual context where responsibility to take care was being assumed to BT, and where, in my view, it would be reasonable to infer that the responsibility so assumed would extend in tort beyond the other party to the contract the third plaintiffs, and the discharge of duties towards which BT proposed to use the valuation. ... His Lordship (Lord Reid) was not making a general statement about all Hedley Byrne situations, but a statement about the particular case before him."

In the result, disclaimers may well be incorporated into a professional person's retainer. This is highly likely to occur, eg in the case of an engagement to give a valuation. However, that still leaves the question of disclaimers which are not contractually based. These raise a different and much more complex question. In BT, the third plaintiffs were not parties to the original contract between BT and Raine & Horne. In Wootten J's opinion Raine & Horne impliedly accepted responsibility for the use of the valuation by BT but not for any other purpose. The second part of the disclaimer sought to negative responsibility to any third party. The resulting question of construction the judge resolved in the third plaintiff's favour (p 237):

"I have also concluded that the present case is one in which although there was a contract with BT although the duties of Raine & Horne under the contract did not extend to the third plaintiffs the situation was such that in the absence of a disclaimer of liability the third plaintiffs Raine & Horne would be taken to be accepting such responsibility. Hence it was not merely a question of whether it said or did something more to assume responsibility. It was a question of whether it disclaimed responsibility which it would have taken to have assumed in the absence of a clear disclaimer."

In MLC v Evatt (1968) 122 CLR 556 Barwick CJ in a dictum noted that in relationships which give rise to a duty of care in the case of utterance a disclaimer will not always be effective. He said (p 570):

"The duty of care in my opinion is imposed by the law in the circumstances. Because it is so imposed I doubt whether the speaker may always except himself from performance of the duty by some express reservation at the time of his utterance but the fact of such reservation particularly if

acknowledged by the recipient will in many instances be one of the circumstances to be taken into consideration in deciding whether or not a duty of care has arisen and it may be sufficiently potent in some cases to prevent the creation of the necessary relationship. Whether it is so or not must in my opinion depend upon all of the circumstances of and surrounding the giving of the information or advice."

In the contractual setting it is interesting to note the recent judgment of the High Court in Darlington Futures Limited v Delco Australia Pty Limited 61 ALJR 76. The plaintiff entered into a contract with the defendant for the latter to enter into futures contracts on behalf of the plaintiff. Heavy losses were incurred in silver and coffee futures. The trial judge accepted the plaintiff's claim that the transactions were unauthorised. Nonetheless, he found for the broker on the basis of exclusion clauses in the contract. On appeal, the Full Court held that the broker was not protected by either of the two very extensive and detailed exemption clauses. The High Court agreed with the courts below that the failure to unlock the straddle was committing the respondent to a form of speculation quite beyond the ambit of the authority given to that broker. The Court agreed with the Full Court that cl 6 of the contract which disclaimed liability where losses arose in any way out of any trading activity undertaken on behalf of the client whether pursuant to the agreement or not would not extend to transactions undertaken without authority. However, it held that the client was limited to \$100 because the claims did arise in connection with the relationship established by the

agreement. As they said:

"A claim in respect of an unauthorised transaction may nonetheless have a connection, indeed a substantial connection, with the relationship of broker and client established by the agreement. We are unable to discern any basis on which cl 7C can be construed so as not to apply to such a claim. The present case is one in which the respondents claim arises in connection with the relationship of broker and client established by the contract between the parties notwithstanding the finding that the relevant transactions were not authorised."

I mention this decision to show that limitation of liability provisions still have a great role to play.

Something more than an overview would be required to deal with certain important statutory obligations imposed on providers of services by the Trade Practices Act and Securities Industry Act and their local equivalents. As it is I do no more than draw attention to them.

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