THE DUTY OF A SOLICITOR TO A BENEFICIARY UNDER A CLIENT'S WILL

In 1861 the House of Lords stated that the proposition that a disappointed beneficiary might sue the testator's solicitor for negligence which caused the gift to him to fail could not be the law "of any country where jurisprudence has been cultivated as a science."[1] But the law of obligations in England, and New Zealand, and in particular the circumstances in which a duty of care will be imposed, has changed since 1861 and in *Ross* v *Caunters*[2] Sir Robert Megarry VC, faced with the situation postulated in the House of Lords,[3] did find solicitors liable to the disappointed beneficiary. This note will consider how his Lordship arrived at this decision, whether a similar result could be reached in New Zealand and whether the imposition of a duty in these circumstances is desirable.

The facts in *Ross* v *Caunters* were not complicated. The plaintiff was the testator's sister-in-law. Owing to the negligence of the testator's solicitors his last will was witnessed by the plaintiff's husband, so that the bequest (of 5/20[4] of his estate) to her was void. In the action for negligence stress was laid on the fact that the solicitors had failed to warn the testator of the effect of section 15 of the Wills Act despite his clearly expressed doubts about witnessing by beneficiaries.[5] In addition, the existence of the plaintiff, and the intention of the testator to benefit her, were well known to the solicitors. (Indeed, the will was sent to the testator at her address.) It was this known intention towards an identified individual which was defeated because of the solicitors' negligence.

I Did the Nature of the Solicitors' Duty to Their Client Affect the Claim by a Third Party?

The defendants admitted all the allegations of negligence but denied that they owed the plaintiff any duty of care, contending that their duty was owed only to the testator and to him only in contract; and that it would be remarkable if, when their client's action was confined to contract, the solicitors should be liable in tort to a third party. In effect, they argued that their "immunity" to an action in tort brought by their client, was a barrier to an action in tort being brought by a third party.

To dispose of this argument his Lordship considered the nature of the duty owed by a solicitor to his client and held that the current state of authority supported the proposition that breach of a duty owed to his client by a solicitor can give rise to a claim either in contract or tort and that accordingly since the solicitor had no immunity to an action in tort brought by his client, there could be no inconsistency in holding the solicitor liable in tort to a third party.[6] For the imposition of concurrent

1 *Robertson* v *Fleming* (1861) 4 Macq 167 at 177 per Lord Campbell LC.
2 [1979] 3 WLR 605.
3 Lord Campbell does use the expression "stranger" (to the solicitor) which might make a difference on the question of foreseeability but does not seem to rest disapproval on this ground alone.
4 Actually 5/21; the total number of twentieths came to 21 (at 608).
5 At 609.
6 At 611-613.

liability on professional men he relied on the exhaustive review of the authorities in *Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp.*[7] Concurrent liability not only of professional men but of others such as building contractors seems now clearly established in England.[8] In Canada also concurrent liability in contract and tort seems accepted in the case of professionals,[9] but has not yet been imposed in other situations. In Australia the question of concurrent liability of professional men is not yet settled.[10]

The current state of the law in New Zealand on this point can best be described as uncertain. A recent decision[11] has affirmed that a solicitor's liability to his client lies only in contract. As far as the liability of persons other than professional men is concerned the High Court cases appear irreconcilable. While some judges have considered themselves bound by the decision of the Court of Appeal in *McLaren Maycroft & Co* v *Fletcher Development Co Ltd*[12] to deny concurrent liability in all types of situations,[13] in at least two cases the possibility of liability in both contract and tort has been allowed without discussion.[14] It seems that only the Court of Appeal can now resolve this difficulty and they appear unlikely to remain long opposed to the direction now being taken in other parts of the Commonwealth.

However, in *Ross* v *Caunters,* the recognition of concurrent liability in both tort and contract of a solicitor to his client solved the difficulty raised by the "immunity" argument advanced by the solicitors. Variants of such an argument are often raised in negligence actions. Thus in *Dutton* v *Bognor Regis UDC*[15] it was argued for the Council that the liability of a builder lies only in contract so that he is not liable in tort to a subsequent purchaser and that it would therefore be inequitable to hold a third party (ie the Council) liable in tort to the same plaintiff for the same damage. In *Dutton* this argument was countered in a way similar to that in *Ross* by denying that the builder was immune to an action in tort.

But sometimes the web of tort and contract relationships is not so straightforward nor so easily disentangled. This is apparent from those New Zealand cases where concurrent liability has not been allowed but where a tortious duty in relation to third parties has nevertheless been recognised. Thus in *Rowe* v *Cleary*[16] the plaintiffs, husband and wife, brought an action for negligence and breach of contract against the defendant solicitor in connection with dealings involving Maori land. It

7 [1979] Ch 384.
8 *Esso Petroleum Co Ltd* v *Mardon* [1976] QB 801; *Batty* v *Metropolitan Property Realisations Ltd* [1978] QB 554.
9 *Dominion Chain Co Ltd* v *Eastern Construction Co Ltd* (1976) 68 DLR (3d) 385 (CA).
10 See *Simonius Vischer & Co* v *Holt & Thompson* [1979] 2 NSWLR 322, 349-354 per Samuels JA (CA).
11 *Rowe* v *Cleary* unreported, Supreme Court, Palmerston North, 26 November 1979, 41/78, Quilliam J.
12 [1973] 2 NZLR 100.
13 See Quilliam J in *Young* v *Tomlinson* [1979] 2 NZLR 441; Jeffries J in *Marlborough Properties Ltd* v *Marlborough Fibreglass Ltd* unreported, Supreme Court, Blenheim, 26 October 1979, 3/77.
14 *Gabolinscy* v *Hamilton City Corporation* [1975] 1 NZLR 150 and *Callaghan* v *Robert Ronayne Ltd* unreported, Supreme Court, Auckland, 17 September 1979, 112/76, Speight J.
15 [1972] 1 QB 373.
16 Supra n 11.

was held that the solicitor's breach of duty to his client, the husband, gave rise only to an action in contract, but that this did not prevent his owing a duty in tort to his client's wife. In fact the contractual duty to the husband had been the foundation of the tortious duty to the wife.[17] A similar approach is suggested in another recent case, *Sutherland* v *Public Trustee,*[18] which, like *Ross* v *Caunters,* was a case where an action was brought in tort by disappointed beneficiaries against the draftsman of a will, in this case, the Public Trustee. The action failed in any event because the defendant had not owed any duty of care to the plaintiff, but had such a duty been owed it seems clear that neither judge nor defending counsel seemed to regard an "immunity" argument as likely to succeed. Similarly, in *Young* v *Tomlinson*[19] the plaintiffs, whose house had deteriorated because of subsidence, brought an action in tort against the previous owners, the builder, architect and council. It was held that the liability of the first defendant (the owners) to the plaintiff was confined to contract but this did not prevent the Court holding the three other defendants liable in tort to the plaintiff for the same damage even although there was no *remedy* available in contract against the first defendant (in contrast to *Rowe* v *Cleary* where Mr Rowe *did* have a remedy in contract).

It is suggested that in New Zealand the difficulties of concurrent liability in contract and tort, including this question of supposed immunity, might better be solved by a re-appraisal of the relationship between tortious and contractual duties in the light of modern developments in negligence law. The duty in tort might be seen as primary, imposed by law in certain circumstances and capable of being owed to more than one person provided the "reasonable foreseeability" requirements are satisfied. A duty in contract would then intrude into this situation, and might alter, or re-define, the relationship between two of the parties, and might extend, narrow or sometimes negate the tortious duty. Sometimes, when the contract makes no mention of a particular eventuality, the existence of a duty in contract will not affect the tortious duty at all.

This is not to suggest that the existence of a contractual relationship will be altogether irrelevant to the nature of a duty in tort, either between the same parties or if a third party is involved. In *Ross* v *Caunters* the duty owed by the solicitor to his client, however classified, and the relationship between them, were fundamental in establishing the "reasonable foreseeability" requirement between the solicitor and the plaintiff:[20] "The plaintiff was named and identified in the will that the defendants drafted for the testator. Their contemplation of the plaintiff was actual, nominate and direct. It was contemplation by contract, though of course the contract was with a third party, the testator."

This close association between the defendants' duties to the plaintiff and to their client leads one to suggest that even to describe the problem in terms of the tort/contract dichotomy may lead to theoretical difficulties. The "contract" is apparently primary, but it involves the defendant in duties to a third party. In English law strict adherence to the doctrine of privity prevents that third party from bringing an action in

17 Ibid at 32.
18 Unreported, Supreme Court, Napier, 8 January 1980, 57/78, Jeffries J.
19 Supra n 13.
20 At 613; and see *Rowe* v *Cleary* supra n 17.

contract; he must resort to an action in tort. Yet the imposition of a tortious duty can be seen as a "rejection of the privity doctrine".[21] Nor can one escape from contradiction by labelling the duty owed to the plaintiff as contractual. In German law, for example, liability is imposed in similar circumstances by extension of the concept of a contract for the benefit of third parties.[22] This duty sometimes seems to merge imperceptibly with a general duty of care, imposed by law, which would in most systems be classified as delictual.

The whole area of debate is a troubled one which will not be solved by a doctrinaire approach dependent solely on contract or on tort theory, or by labelling particular instances of liability as contractual or tortious.

II The Modern Approach to an Action in Negligence

Having disposed of the preliminary objection that the nature of the solicitors' duty to their client barred the claim by a third party, his Lordship considered the central issue in the case, whether the solicitors owed the plaintiff a duty of care. Here he adopted the approach of Lord Wilberforce in *Anns* v *Merton London Borough Council*[23] which now seems established as "a valuable and logical guide"[24] in all kinds of cases of negligence. Provided the *Donoghue* v *Stevenson* test of reasonable foreseeability is satisfied, then the more stringent tests and additional qualifications which have arisen on the perimeters of negligence law can now be subsumed under Lord Wilberforce's second head viz "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise".[25] Not only does this make an area such as negligent misstatement conceptually more coherent [26] but it is also allows a more manageable discussion of policy factors in relation to, for example, the limitation of liability or the nature of damages recoverable, which since *Home Office* v *Dorset Yacht Club Ltd*[27] have played a large part in negligence judgments.

By using the *Anns* analysis, a court can now consider whether prima facie a duty of care exists without having first to classify the negligence as an act, an omission or a statement, a classification which is not itself free from difficulty.[28] Factors which have previously been important in establishing liability will then be relevant in the second stage of the *Anns* analysis. For example elements such as reliance, skill, advice offered "in the course of business", which were crucial in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*[29] and *MLC* v *Evatt*[30] may still be important in that their absence may "reduce or limit the scope of the duty" if the negligence consisted of a misstatement (such an approach was adopted, for example, by Woodhouse J in *Scott Group*); similarly, the fact that the

21 *Lucas v Hamm* (1961) 11 Cal Rptr 727 at 731 per Shoemaker J, noted (1965) 81 LQR 479. See *Ross* v *Caunters* at 616.
22 Zweigert & Kötz, *An Introduction to Comparative Law* (Weir trans 1977) 129, citing RGZ 127, 218; see also BGH NJW 1959, 1676; BGH NJW 1965, 1757.
23 [1978] AC 728.
24 *Scott Group Ltd* v *McFarlane* [1978] 1 NZLR 553, 573 per Woodhouse J.
25 [1978] AC 728, 752.
26 See eg the judgment of Woodhouse J in *Scott Group* supra n 24.
27 [1970] AC 1004.
28 See eg *Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223, discussed below; and *Rutherford* v *Att-Gen* [1976] 1 NZLR 403.
29 [1964] AC 465.
30 *Mutual Life and Citizens' Assurance Co Ltd* v *Evatt* [1971] AC 793.

act of negligence consisted of the failure of a public authority to act will require the examination of the factors considered in the *Anns* case itself; or the fact that the negligence gave rise only to "pure" economic loss may require the application of stricter tests of foreseeability and proximity, although again as part of the second stage of the enquiry.

In *Ross* v *Caunters* a prima facie duty of care was established without difficulty but at the second stage some additional factors had to be considered. His Lordship, rightly it is suggested, did not classify the negligence of the solicitors as a misstatement; to do so would have raised the difficulty that there had been no express or implicit reliance by the plaintiff, such as had served to support the action in the Canadian case of *Whittingham* v *Crease & Co.*[31] His Lordship preferred therefore to base the duty of care directly on "pure *Donoghue* v *Stevenson* principles". But since he chose this path he faced further difficulties. Had he seen the case as one of misstatement no problem about the nature of the damages recoverable would have remained: *Hedley Byrne* itself establishes the recovery of "pure" economic loss in such circumstances. But on "pure *Donoghue* v *Stevenson* principles" the recovery of pure economic loss may still present difficulties, and there was no question but that the plaintiff had suffered only economic loss, unaccompanied by any physical damage at all.

In New Zealand and Australia the recovery of such "pure" economic loss is no longer barred by a rigid "no recovery" rule. The number of established exceptions had begun to make it doubtful whether such a rule existed, as numerous dicta of dissatisfaction indicated. Recovery under *Hedley Byrne* was the most obvious anomaly; and the growing trend to reclassify as "property damage" the cost of preventing a dangerous situation from materialising created another anomaly.[32] In the *Caltex Oil*[33] case a majority of the High Court of Australia declared that there was no longer a rigid rule and held that recovery of such loss is possible in restricted circumstances; and the judgments in *Caltex* attempt to formulate a test or tests which will define those circumstances. In New Zealand this approach has been adopted and the *Caltex* tests applied in at least two cases[34] to allow recovery of pure economic loss; so in New Zealand in the *Ross* v *Caunters* situation, the *Caltex* tests (foreseeability of harm to the plaintiff individually, a sufficient degree of proximity between tortious act and resultant detriment) could be applied, as they were by Megarry VC, to allow recovery. A similar result has been arrived at in one Australian case, in which the facts were indistinguishable from *Ross* v *Caunters.*[35]

It may, however, be respectfully questioned whether Megarry VC, as an English judge of first instance, was thus free to use a similar approach, being bound by the Court of Appeal. His Lordship found justification in the decision of the Court of Appeal in *Ministry of Housing and Local Government* v *Sharp.*[36] But, with respect, it is suggested that the major-

31 [1978] 5 WWR 45.
32 Eg *Dutton* supra n 15 and *Bowen* v *Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.
33 *Caltex Oil (Australia) Pty Ltd* v *Dredge "Willemstad"* (1976) 136 CLR 529.
34 *J & J C Abrams Ltd* v *Ancliffe* [1978] 2 NZLR 420; *Lewis Eady Ltd* v *Elevators Pty Ltd* unreported, Supreme Court, Auckland, 24 August 1979, 1071/76, Holland J.
35 *Watts* v *Public Trustee* noted (1980) ACLD para 087 (WA Supreme Court).
36 Supra n 28.

ity in *Sharp* does not support his argument. Lord Denning MR based his judgment on an extension of liability for negligent misstatement under *Hedley Byrne* principles and Cross LJ also appears to have had that approach in mind. Only Salmon LJ employed a straightforward *Donoghue* v *Stevenson* approach, disregarding as irrelevant the fact that only pure economic loss resulted.[37] Also one factor discussed at length in *Sharp,* even if in other sections of the judgments, but not included in Megarry VC's parallel analysis of *Sharp* and *Ross,* is the importance of the "statutory environment"; this has been seen as a crucial factor in recent negligence cases, for example in *Scott Group* and the *Anns* case itself. Since *Sharp* the Court of Appeal has not allowed recovery of "pure" economic loss; in *SCM (United Kingdom) Ltd* v *W J Whittall & Son Ltd*[38] and *Spartan Steel & Alloys Ltd* v *Martin & Co (Contractors) Ltd*[39] only economic loss depending on physical damage was recoverable. Very recently, in *Lambert* v *Lewis,*[40] the Court of Appeal has again refused to allow the recovery of pure economic loss. It is true that both in this case and in the judgment of Lord Denning in *Spartan Steel* the question of recovery was seen as one of policy or "common-sense":[41] perhaps the extension of recovery in *Ross* could be justified on this ground.

III Policy Considerations

If Megarry VC had been free to come to the result he did, or if in a similar situation in New Zealand a duty of care were established, are there then any policy factors which might militate against such a result? First there is the "floodgates" argument, advanced in *Ross* v *Caunters* and there strengthened by reference to the projected difficulty facing a solicitor who must reconcile his duty to his client with that to a host of hopeful beneficiaries. But this fear appears groundless. The features of proximity, knowledge and intention mentioned above and stressed in this case together with the application of the *Caltex* tests all serve to limit a solicitor's liability. A recent New Zealand case illustrates these limitations: in *Sutherland* v *The Public Trustee*[42] Jeffries J held the defendant not liable to disappointed beneficiaries where the will complained of was not technically deficient and where, though the judge agreed the testator probably *did* want to benefit the plaintiffs, "that was not what his will said," and "to hold there was a duty of care to persons the testator deliberately refused to nominate himself would take the law very far beyond its present limits."[43] Alternatively, the judge found that even had there been a duty of care owed to the plaintiffs, the defendant was not in breach of it. In *Ross* v *Caunters* Megarry VC was careful to confine himself to the narrow limits of the case before him; this fact coupled with the decision in *Sutherland*'s case may serve to dispose of the spectre of indeterminate liability.

More complex difficulties are raised by the nature of the loss recovered in *Ross* v *Caunters.* Counsel for the defendants argued that the plaintiff had suffered no financial loss; she had not been deprived of

37 At 278.
38 [1971] 1 QB 337.
39 [1973] QB 27.
40 [1980] 1 All ER 978.
41 At 1005-1006 per Stephenson J.
42 Supra n 18.
43 At 25-26.

anything but had simply failed to get something extra. It has also been pointed out that the recovery of her loss by the plaintiff did not restore the status quo; the other legatees had received a windfall while she recovered from the solicitors; the testator had inadvertently succeeded in disposing of 26/21 of his estate.[44] Megarry VC, who throughout his judgment had stressed the loss suffered by the plaintiff as a result of the solicitors' negligence, rejected counsel's argument: ". . . a failure to receive an assured benefit is a loss."[45] This, with respect, seems perfectly reasonable. The question of the difference between damages awarded in contract and tort is one which is beyond the scope of this note, even if the law on this subject were settled; but the difficulties which arise over the loss of an "expectation" are usually associated with an often unquantifiable unrealised profit.[46] Here there was no difficulty at all in quantifying the plaintiff's loss.

The argument that the status quo was not restored suggests that the decision in *Ross* v *Caunters* might have implications, not only in the law of negligence, but also for the law of restitution and might possibly require changes in the administration of the law of wills. Should the solicitors be able to recover their loss from the other legatees, perhaps by some action for unjustified enrichment? Or, since the aim of tort law is now to recompense the plaintiff for his loss rather than to punish the defendant for his fault, might a prior right against the estate be allowed to a plaintiff in Mrs Ross' position so that she suffers no loss and the tort remedy is not needed?

The decision in *Ross* v *Caunters* seems in many ways to epitomise current trends in the law of negligence, both in English and New Zealand law. These developments can be paralleled in American law; in *Ross,* two American cases were cited in support of recovery. It is yet one more indication that no group may now, with any confidence, regard itself exempt from liability for negligence under *Donoghue* v *Stevenson* principles; solicitors have fared no better than, for example, accountants in *Scott Group* or builders in *Bowen.* It is also another example of the recognition of concurrent liability in contract and tort, the seeds of which lie in *Donoghue* v *Stevenson* itself, and to which the common law seems now committed. In allowing recovery for "pure" economic loss, too, the decision shows that in the kind of damages recoverable the scope of negligence is widening. It is now apparent that the expanded law of negligence applies in cases where previously much older and apparently more settled doctrines of law, in this case, the law of testate succession, held sway. These doctrines too may have to be re-assessed and adjusted in the light of developments in the law of negligence.

M A MULGAN

44 (1979) 123 Sol J 841.
45 At 625.
46 See for example the conflicting judgments of Woodhouse and Cooke JJ in *Scott Group* supra n 24.