COMMENTS
COMMENTAIRES

Negligent Misrepresentation: A Postscript

Scant attention was paid by me, when I recently discussed this area of the law,[1] to the Saskatchewan case of *Haig* v. *Bamford*,[2] which, at that time, had been decided by the provincial Court of Appeal. Since the publication of my article, the report of the case in the Supreme Court of Canada, where the decision of the Lower Court was reversed, has now appeared,[3] and it merits some comment. Similarly, the decision of the Manitoba Court of Appeal in *Porky Packers Ltd* v. *Town of The Pas*,[4] which was considered at greater length in the earlier article, has now been reversed by the Supreme Court of Canada;[5] this too deserves more than passing mention. In effect the Supreme Court imposed liability in the *Haig* case, when the provincial court had denied it, and refused to allow liability in the *Porky Packers* case, where the provincial court had found it. At a time when liability for negligent misrepresentation seems to be extending its scope in Canada as well as England, where recent decisions in both jurisdictions serve to underline the growing importance of this comparative newcomer to the select company of torts,[6] these anomalous decisions are of great interest.

In the case of *Haig* v. *Bamford*,[7] the defendants were accountants who prepared a financial statement about a company called Scholler Furniture and Fixtures Ltd, at the request of the company. The purpose of this statement, as the defendants knew, was to satisfy the requirements of the Saskatchewan Economic Development Corporation (Sedco), which had agreed to lend the company $20,000 provided a satisfactory audited financial statement of the company from its incorporation to the date of the agreement was produced,

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[1] G.H.L. Fridman, *Negligent Misrepresentation* (1976) 22 McGill L.J. 1.

[2] [1974] 6 W.W.R. 236; (1974) 53 D.L.R. (3d) 85; reversing [1972] 6 W.W.R. 557.

[3] *Haig* v. *Bamford, Hagan, Wichen & Gibson* [1976] 3 W.W.R. 331.

[4] (1974) 46 D.L.R. (3d) 83.

[5] (1976) 7 N.R. 569.

[6] In Canada: see *West Coast Finance Ltd* v. *Gunderson, Stokes, Walton & Co.* (1975) 56 D.L.R. (3d) 460; *Tormont Industrial Holdings Ltd* v. *Thorne Gunn, Helliwell & Christenson* (1976) 62 D.L.R. (3d) 225; in England see *Esso Petroleum Co. Ltd* v. *Mardon* [1976] 2 All E.R. 5.

[7] *Supra*, note 3.

and provided also that a further $20,000 could be obtained by the company by way of equity capital, *i.e.* by the discovery of another investor. Thus the defendants knew that their statement was going to be used by the client, the company, for these purposes. This was the "crucial finding"[8] of the trial judge that went undisturbed on appeal, *viz.*,

> ... that the accountants knew, prior to the completion of the financial statement... that the statement would be used by Sedco, by the bank with whom the company was doing business and by a potential investor in equity capital.

The statement was prepared. It was shown to the plaintiff. He was influenced by the contents of the statement. In consequence he bought over $20,000 worth of shares in the company and guaranteed a bank loan to the extent of another $20,000. However, despite this infusion of money, the company, of which the plaintiff had now become president, was again in trouble. It then emerged that in preparing the statement, the accountants had shown a payment of $28,000 from a company for which the Scholler company had undertaken to do work, as being payment for work completed, when it was really only a prepayment and the money had not yet been earned. That sum was in reality a liability; in the accounts it was treated as revenue. As a result the state of the Scholler company was made to appear better than it actually was. When fresh accounts were made up, after the discovery of the error, the true picture was revealed; the company had made a loss for the period in question, not a profit. If this had been clearly stated, the plaintiff on viewing the accounts would never have invested his money; but it was too late. He was enmeshed in the last throes of the Scholler company and was forced to provide further money to meet the payroll. The company was forced to close its business, the plaintiff losing the value of the shares, the subsequent loan and a further sum under the bank guarantee. He proceeded against the various parties but abandoned suits against all save the accountants.

The trial judge found that the accountants had been negligent and gave judgment for the plaintiff. The Court of Appeal, by a majority, reversed this decision and held that the accountants were not liable. The Supreme Court restored the original judgment and held in favour of the plaintiff. Perhaps the most puzzling feature of this case is the decision of the Saskatchewan Court of Appeal. Why did the majority of that court find for the defendants, at a time when there has been much extension of the notion of liability

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[8] *Ibid.*, 333.

for negligent conduct? The decision of the Saskatchewan Court of Appeal seems to be a throwback to the days of *Candler* v. *Crane, Christmas & Co.*[9] where the majority of the Court of Appeal, Denning L.J. dissenting, arrived at precisely the same conclusion on facts closely resembling those before the Saskatchewan court.[10] The role of the Supreme Court of Canada in this case is analogous to that of the House of Lords in *Hedley Byrne* v. *Heller,*[11] decided some dozen years after the *Candler* case. The English decisions were at least understandable: the House of Lords did revolutionize the law. How could the Saskatchewan Court, in the 1970's, in the light of English and Canadian authorities (all of which were canvassed by the Supreme Court in the judgment of Dickson J.) have reached a decision which appeared to be contrary to the existing state of the law?

The majority of the Court of Appeal decided the case on the ground that there was no duty of care owed by the accountants to the plaintiff. Although the accountants knew, or may have known that the accounts were going to be distributed and shown to potential investors in the company, they did not know the identity of any individual potential investor. In particular, they did not know that the accounts were going to be shown to, and relied on by the plaintiff himself. To Hall and Maguire JJ.A. of the Saskatchewan Court of Appeal, before any duty of care could be owed in such circumstances (*i.e.* with respect to the contents of a financial statement) the potential defendant, the person alleged to be under the duty, had to be aware of the identity of the potential plaintiff, the person to whom the duty was alleged to be owed. Failing that, the only responsibility of the accountants was to be honest and since their mistake was an "honest blunder", they could not be held liable.

The trial judge, Woods J.A. (dissenting in the Court of Appeal) and the Supreme Court of Canada disagreed. It was sufficient "that the accountants knew that the information was intended to be disseminated among a specific group or class", as Dickson J. put it.[12] It was sufficient, in the words of Martland J.,[13] with whom Judson and de Grandpré JJ. agreed, that the accountants knew, prior to the completion of the statement, that it would be used by Sedco, by the bank with which the company was doing business "and by a

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[9] [1951] 2 K.B. 164.

[10] See G.H.L. Fridman, *Negligence by Words* (1954) 32 C.B.R. 638 in which the judgments in this case are analyzed.

[11] [1964] A.C. 465.

[12] *Supra,* note 3, 337.

[13] *Ibid.,* 345-346.

potential investor in equity capital". The language of these judges, it will be seen, seems closer to the original finding of fact by the trial judge. The language of Dickson J. (Laskin C.J.C., Ritchie, Spence, Pigeon and Beetz JJ. concurring), is broader and will perhaps, be a source of difficulty in the future. In his judgment, Dickson J. considers the role of accountants in modern business life, the particular English and American cases dealing with accountants, the law of negligent misstatement or misrepresentation in general, and the leading Canadian cases,[14] *Wellbridge*,[15] *Rivtow*,[16] and *Nunes Diamonds*.[17] Some attention should therefore be paid to the words and reasoning of Dickson J.

The new corporate role in society has resulted in increased responsibility for the accounting profession; statements by accountants can affect the general public as well as actual and potential shareholders. The issue became where to draw the line between indiscriminate liability for financial loss, and liability consistent with general legal principles of negligence. There were three major tests: (i) liability based on *foresight* of use of the financial statement, and reliance thereon, by the plaintiff; (ii) liability based on actual *knowledge* of the limited class that would rely on the statement; (iii) liability founded on *actual knowledge* of the precise person, the plaintiff, who was going to use and rely on such statement.[18] Each of these tests of liability, it may be said, recognizes in a different way the concept of liability for the economic consequences of a misleading financial statement. They differ, however, in material respects. The first is based on "foresight": what the reasonable man would expect in the circumstances, the familiar test of responsibility for negligence where physical harm to a person or his property is involved. The remaining tests rely upon "knowledge", actual appreciation of the facts and awareness that a specific consequence will occur. Clearly this is a narrower and stricter test of responsibility. But, as Dickson J. explained, actual knowledge of a limited class is a broader test than actual knowledge of the identity of the plaintiff.[19] The Supreme Court adopted the broader test but left open the question whether "mere" foresight would have sufficed. In all

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[14] *Supra*, note 1.

[15] *Wellbridge Holdings Ltd* v. *Winnipeg* [1971] S.C.R. 957.

[16] *Rivtow Marine Ltd* v. *Washington Iron Works* [1974] S.C.R. 1189.

[17] *J. Nunes Diamonds Ltd* v. *Dominion Electric Protection Co.* [1972] S.C.R. 769.

[18] *Supra*, note 3, 338.

[19] *Ibid.*, 339.

the circumstances of this case there was the requisite actual knowledge and that was enough to found liability.

There can be little doubt that this conclusion, as to the type of knowledge required in such cases, is supported by English, American and Canadian authority. The dissenting judgment of Denning L.J., as he then was, in the *Candler* case,[20] the distinction between the famous American cases of *Glanzer* v. *Shepard*,[21] and *Ultramares Corp.* v. *Touche*,[22] more recent American decisions which distinguish the fact-situation in the *Ultramares* case[23] and the *ratio decidendi* in *Hedley Byrne* v. *Heller*:[24] all point in the same direction. If there was knowledge of the use that was going to be made of the statement, liability arises. Whether foresight of use is sufficient is not so clear. This may depend upon whether the courts will accept the notion of "undertaking" or "assumption" of responsibility flowing from the agreement to enter into a particular relationship with a person.

Perhaps we have not yet reached this stage in the development of liability for negligent misstatements. The cases thus far, in various jurisdictions, appear to have stressed factors such as the representation of the defendant as to his skill or expertise, the knowledge of the defendant as to the consequences that would flow from his statement, and the ultimate proximity between the acts of the defendant and the financial injury suffered by the party relying upon the statement. In emphasizing "knowledge", the actual appreciation of what would be likely to happen, the courts appear to be coming down in favour of as objective a view of the law as possible. In other words, they seem to be trying to avoid making any more policy decisions than were inherent in *Hedley Byrne* v. *Heller*.[25] To adopt a test of foreseeability, or of assumption of responsibility, as Dickson J. pointed out, would invite more subjectivity. The courts would be continually struggling with the issue: Should we impose liability for this kind of harm on this kind of defendant?[26] Since the judgment of Lord Denning, M.R. in *Dutton* v. *Bognor Regis U.D.C.*,[27] there is

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[20] *Supra*, note 9.

[21] 233 N.Y. 236 (1922). The public weighers of goods knew what would be the effect of the certificate as to weight which they issued.

[22] 225 N.Y. 170 (1931). The accountants did not know that the balance sheet they had prepared was going to be shown to a factor who advanced money to the company on the strength of the document.

[23] *Rusch Foctors, Inc.* v. *Levin* 284 F.Supp. 85 (1968); *Rhode Island Hospital Trust National Bank* v. *Swartz* 455 F.2d 847 (1972).

[24] *Supra*, note 11.

[25] *Ibid.*

[26] *Supra*, note 3, 341.

[27] [1972] 1 Q.B. 373.

more frankness in the air, and a greater willingness to admit the role of policy in the law of negligence, and the role of the courts in making policy, but there is nonetheless a certain coyness to be found in judgments (especially in Canadian courts) when it comes to declarations of this sort. If a cause can be determined on what might be called strictly factual grounds, then so much the better. Hence, perhaps, the way Dickson J. approached the issue in *Haig* v. *Bamford*.[28] Earlier authority could be used, in conjunction with the findings of fact of the trial judge, so settle the precise point under debate, without the necessity for more fundamental analysis of the role of the law. The wider philosophical issues will have to wait for future judicial determination.

Academic speculation, however, may anticipate such determination. In my earlier article,[29] I discussed certain aspects of the duty of care which was owed under and in accordance with the decision in the *Hedley Byrne* case. The emphasis there was upon the kinds of relationship which could give rise to such duty. What the *Haig* case entails, however, is slightly different. Granted that the parties are in the kind of relationship out of which the duty can rise (*e.g.*, by the fact that the defendant, the person providing the statement or advice, is the kind of person upon whose statements reliance may be placed, either generally or in the particular circumstances of the case), does the existence of the duty in the individual situation rest upon actual knowledge or foresight of consequences? If liability for economic or financial loss caused by a negligent misrepresentation is to approach liability for physical injury caused by other types of negligent behaviour (driving carelessly, manufacturing harmful goods, *etc.*) then it might be thought that the wider basis for liability should be the one finally adopted by the courts. Liability in negligence, generally speaking, is founded upon the foresight of the reasonable man, not upon the actual knowledge of the particular defendant. It is what he *ought* to have known or foreseen that is important, not what in fact he *did* know or foresee. Can the same not apply more generally? The danger is, as pointed out by Dickson J., following the language of Cardozo J. in the *Ultramares* case, that this might lead to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[30] But this does not have to follow, as indeed Denning L.J. suggested in the *Candler* case,[31]

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[28] *Supra*, note 2.
[29] *Supra*, note 1.
[30] *Supra*, note 3, 338.
[31] *Supra*, note 9, 180-84; see Fridman, *supra*, note 10, 654-656.

and was later demonstrated in *Hedley Byrne* v. *Heller*.[32] I find it hard to accept, therefore, that basing liability upon the test of foreseeability would inevitably result in an overlarge extension of the liability that unquestionably exists or can arise at the present time. Unless the courts deliberately desire to limit liability for negligent misrepresentation (in a manner which, having regard to the example and logic of negligence liability in general, one can only describe as "unnatural"), there should be no impediment to the adoption of the foreseeability test for this type of liability any more than there has been for its adoption in the law of negligence generally.

Only the difference between physical harm and economic loss, and the possibility of larger, more extensive, more costly liability, might justify a differentiation in the bases of liability. In the days when awards of damages for physical injuries suffered through negligence are mounting,[33] it seems difficult to see any possible justification for a distinction between two varieties of negligence liability based upon the fear of exaggerated awards, or too extensive a liability. Events have, as it were, caught up with the fears of the 1950's, as expressed by the majority in the *Candler* case. Experience, perhaps, has come to the aid of logic — to use the contrast employed by Holmes J. almost a hundred years ago on the very first page of his book, *The Common Law*.[34] That being so, it is suggested that in the area of negligent misstatement there is no barrier standing in the way of broad liability compatible with the general principles of the law of negligence.

There would continue to exist limits to liability. Was the request for advice or information coupled with the reliance thereon, such as to give rise to the duty? This is the question considered by the Supreme Court of Canada in *Porky Packers Ltd* v. *Town of The Pas*.[35]

Here the plaintiff alleged he had suffered loss by beginning to build an abattoir after having been assured by an official of the municipal authority that the sale of the land on which the abattoir was going to be built had been approved by the council. The land belonged to the council. Subsequently, the sale of the land was set aside because the plaintiff had participated in the approval by the town council. Furthermore, the use of the land for an abattoir violated a planning scheme already adopted by the town. The plain-

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[32] *Supra*, note 11.

[33] See, *e.g.*, *Loney* v. *Voll* [1974] 3 W.W.R. 193; *Andrews* v. *Grand & Toy Alberta Ltd* [1976] 2 W.W.R. 385.

[34] O.W. Holmes, *The Common Law* (1881).

[35] *Supra*, note 5.

tiff sued on the basis of negligent misrepresentation, alleging that the town council's agent, who should have known that both the sale and destined use of the land were improper and subject to attack, carelessly told him that the requisite approval had been obtained. The plaintiff relied upon the agent's statements and lost the money spent on construction. At trial and before the Manitoba Court of Appeal the plaintiff succeeded.[36] The Supreme Court of Canada reversed these decisions.

The real basis of the judgment of Pigeon J. (Martland and Ritchie JJ. concurring),[37] was the illegality of the plaintiff in participating in the sale of the land to him. Since the resulting contract between the town and the plaintiff was illegal, it would have been inconsistent and contrary to principle to have permitted an action to lie in tort on a negligent misrepresentation which induced such an illegal contract. Although the issue was left without full discussion, it seems that this aspect of the case, which appears to have eluded the courts below, figured prominently in the thinking, if not the language, of the Supreme Court. A plaintiff will not be allowed to succeed in either tort or contract, if he himself is somehow involved in illegality at the time the cause of action arises.[38] As an English judge said in another context,[39] where, as it happened, the plaintiff was equally tainted with impropriety, *procul este profani.*

However, the main thrust of the judgment of Spence J. (Laskin C.J.C., and Judson, Dickson, Beetz and de Grandpré JJ. concurring) was in a different direction. To their Lordships the issue to determine was whether there had been a representation given by someone who owed a duty under the *Hedley Byrne* doctrine. There was no representation, nor was there any negligence. But, perhaps more importantly, the situation did not come within the doctrine. As Spence J. explained:

> It is requisite for liability under the *Hedley Byrne* principle that the representations be made to a person who has not expert knowledge himself by a person whom the representee believes has a particular skill or judgment in the matter, and that the representations were relied upon to the detriment of the representee.[40]

In the case before the Court, as the facts revealed, the plaintiff, the representee, as Spence J. called him, had more knowledge of what was going on, or was supposed to be going one, than the

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[36] *Cf.* Fridman, *supra,* note 1, 25-27.
[37] (1976) 7 N.R. 569, 584.
[38] G.H.L. Fridman, *The Wrongdoing Plaintiff* (1972) 18 McGill L.J. 275.
[39] *Harry Parker Ltd v. Mason* [1940] 2 K.B. 590, 602 *per* McKinnon L.J.
[40] *Supra,* note 32, 583.

representor, the official of the municipal corporation. So that, even if there had been a representation made by the latter, the former had relied on his own knowledge and judgment at all times.

The decision in the Supreme Court of Canada in this respect does not appear to add anything to what has already been decided and discussed in relation to the *Hedley Byrne* principle. It rather exemplifies and applies that principle. However, the case is not without its importance as an illustration of a refusal on the part of the highest court in Canada to create liability at a time when, as already suggested, the scope of tortious responsibility is increasing. A party who has incurred financial loss will not always be able to place the responsibility at someone else's feet.

The two cases which have been considered here, in effect, constitute the two poles of liability for negligent misrepresentation: one requires knowledge and appreciation of the consequences, the other requires reliance. The duty to take care when making a statement, on which all is based, depends upon the extent to which the maker of the statement (i) knows who is going to use it and for what purpose and (ii) appreciates that reliance is going to be placed upon his opinion. The most important consideration is the expertise of the maker of the statement (as the *Evatt*[41] case would stress), and to a lesser extent the special knowledge of the facts and the circumstances. As I indicated in my earlier article,[42] there may still be a chance for the courts in Canada to extend the scope of liability if they refuse to adopt the somewhat narrower attitude of the Privy Council in the *Evatt* case. The language employed in the *Porky Packers* case does not preclude this.

Furthermore, the decision in *Haig* v. *Bamford* does not conclusively settle the question of which test applies to create a duty to the plaintiff in cases of negligent misrepresentation. Must the defendant possess "actual" knowledge of the circumstances or merely be able to foresee, as a reasonable man, the consequences of his actions? We will have to wait for the answer.

G.H.L. Fridman*

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[41] *Mutual Life & Citizens' Assurance Co.* v. *Evatt* [1971] 1 All E.R. 150.

[42] *Supra*, note 1.

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