

GENERAL TRENDS IN PROFESSIONAL LIABILITY

by

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Introduction

In 1939 the English Court of Appeal in Groom v Crocker¹ clearly stated that the law regarding the relationship between a solicitor and his client was purely and exclusively contractual. A lawyer could not be sued in tort for negligence. However, to say the least, much has changed in the past forty-seven years.

Today, lawyers and other professionals² may be found liable in negligence not only to their own clients but, as well, to other adversely affected third parties.³

So extensive is a lawyer's professional negligence liability now that the provincial governing body, the B.C. Law Society, has been advised by actuarial consultants to expect upwards of 6.2 million dollars in negligence claims in 1986 alone.⁴

This example of the explosion in negligence liability is not confined to lawyers. Allegations of professional negligence resulting in pure economic loss are of very real concern as well to accountants, architects, engineers, stock brokers, insurance brokers and agents, company officers and directors, bankers, real state agents and appraisers, and many others. The tremendous expansion of the concept of "duty of care" since Donoghue v Stevenson⁵ in 1932 has had a profound impact on all professions. Liability in negligence is no longer merely found for physical damage resulting from negligent acts but now includes liability for pure economic loss arising from negligent words and omissions.⁶

How did this explosion in negligence law occur? What effect has it had? Where will it end? Where should it end? This paper will

address each of these crucial questions. In the course of doing so, the evolution of the expansion of the duty of care will be examined, specifically as it has affected professionals in regard to claims involving pure economic loss. Particular emphasis will be placed on the very recent and still emerging trend to restrict and place limits on the ambit of the duty of care - to, in effect, step back from the explosion which was fired by Donoghue v Stevenson and fueled by Anns v London Borough of Merton.⁷

Following upon this, the second part of this paper will focus on what has happened to professionals who have attempted to protect themselves against negligence claims with liability insurance. The current "crisis in liability insurance" will be examined with a view to updating and clarifying the present situation, as professionals and others attempt to purchase reduced coverage insurance at dramatically escalating costs. So extensive is this crisis that many have been forced to go with partial or completely self-insured plans, while others have had no choice but to take their chances and operate without any liability insurance at all.⁸

The third and final portion of this paper will discuss the "prima facie duty of care" doctrine and will suggest that this doctrine is inherently problematic and in need of serious review and re-evaluation. As the assumption of the existence of the "deep pocket" of liability insurance becomes more tenuous it will be argued that the duty of care issue must be looked at again more closely and specific parameters will be suggested.

I Professional Liability In Context

Professionals have always had a love/hate relationship with their clients or with those to whom they give advice or opinions. Assistance which results in a benefit to the client is appreciated, the professional is paid, often handsomely, for his or her expertise, and both parties part company in improved circumstances. However, in those instances where something goes awry and the advice, whether negligent, incorrect, or incompetent, results in the client suffering an economic loss, quite a different result occurs.

Over the years the law has had to cope with the claims of the aggrieved client, and over the years the liability of the professional and the causes of action available to the plaintiff have changed markedly.

The English Court of Appeal in Groom v Crocker⁹, in 1939, clearly and unequivocally stated that the relationship between a solicitor and client was a "contractual one." Greene, M.R. pointed out that it was "by virtue of that relationship that the duty arose, and it had no existence apart from that relationship."¹⁰ Consequently the only action available to the client was in contract. The client could not sue in tort. In reaching this decision the Court of Appeal reaffirmed the division between tort and contract that preceding courts had laid down. And, since an action in contract was the only avenue available, injured third parties not privy to a contract with the defendant professional could not succeed in establishing a case for liability.¹¹

The only other possible action open to a client outside of contract was to prove deceit.¹² Negligence was not a sufficient

avement. In Derry v Peek the court stated that in order to establish liability, the plaintiff had to prove that "a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."¹³

This was the situation which prevailed prior to the landmark decision of the House of Lords in Donoghue v Stevenson.¹⁴ The rules were clear. Potential causes of action were well defined, potential defendants could be identified with some confidence and the limits of liability were known. However, judicial activism was waiting in the wings. While it was Hedley Byrne v Heller¹⁵ that would be the first to make professionals liable for actions in negligence for misstatements outside of contracts, its genesis actually began in 1932 with Donoghue v Stevenson.

Donoghue v Stevenson

The House of Lords' decision in Donoghue v Stevenson has been disparagingly referred to as the escape of the genie from the bottle.¹⁶ However, its importance and impact on tort law has never been questioned. Lord Denning M.R. noted that "since the decision in Donoghue v Stevenson in 1932, we have had negligence established as an independent tort in itself."¹⁷

The facts in Donoghue are well known. The plaintiff brought suit against a manufacturer of ginger beer alleging that she had consumed a bottle of their product containing the decomposed remains of a snail, the unfortunate presence of which had caused her severe physical distress. The preliminary issue which was the subject of the appeal

was this - did the defendant manufacturer owe the plaintiff consumer, with whom there was no contractual relationship, a duty to take care. Precedent would have indicated that no duty would arise outside of contract. However, legal history was about to be made. In a 3:2 decision the House of Lords held that indeed a duty of care was owed to the plaintiff.

In reaching his decision, Lord Atkin forever altered the course of negligence law when he referred to the parable of the Good Samaritan and formulated the by now familiar "neighbour principle."

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my actions that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called into question.¹⁸

The long term impact of these words was to extend far beyond the mere facts of the case. The "neighbour principle" and the notions of "reasonable foresight" and "proximity" were not to be confined within the parameters of product liability cases or fact patterns involving physical damage. Quite the contrary, these words were soon to evolve to the lofty heights of "a statement of principle" one which, as Lord Reid put it, "ought to apply unless there is some justification or valid explanation for its exclusion."¹⁹ This despite the unheeded warning of Lord Atkin himself²⁰ and the dissent of Lord Buckmaster.²¹

The immediate impact of Donoghue was, of course, limited by the existence of the exclusory rule.²² Professor David Partlett

points out that under the exclusory rule "no duty was owed where the negligence caused pure economic loss, that is, economic loss not resulting either from personal injury or property damage. This rule applied whether the economic loss resulted from either an act or words."²³ This was soon to change, however.

That change began in 1951 with the English Court of Appeal in Candler v Crane, Christmas & Co.²⁴ a case which dealt with the issue of the professional negligence liability of accountants and auditors. It was held by the majority that no duty of care was owed to the plaintiff, a man who to the knowledge of the defendants had relied on a negligently prepared accounts statement and had suffered pure economic loss as a result. However, the dissenting judgement of Lord Denning was to find strong support over thirteen years later in the decision of the court in Hedley Byrne v Heller.²⁵

In Candler, Lord Denning looked at professionals and considered the questions: who is under a duty to take care, what is the nature of the duty, to whom is this duty owed, and how far should this duty extend?

My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people - other than their clients - rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports.²⁶

They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts ... so as to induce him to invest money or take some further action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing

and to whom their employers without their knowledge may choose to show their accounts.²⁷

Although Lord Denning's views regarding a professional's liability in negligence for economic loss did not win the day in Candler they were, however, vindicated by the House of Lords in Hedley Byrne v Heller, a landmark decision that created the first exception to the long standing exclusory rule.

In that case, the plaintiffs, desirous of ascertaining the creditworthiness of a certain client prior to making themselves liable for that client's debts, had their bank contact the defendant bank (which was the client's own financial institution) to request a credit reference. The negligently prepared reference indicated the client company was financially stable when in fact it was not. This reference was accompanied by a disclaimer and no fee was charged for it. In relying on the information the plaintiffs suffered substantial economic loss.

Because of the disclaimer the court held that in this particular case there was no liability. However, the true importance of Hedley Byrne was to be found in the fact that the House of Lords recognized that a similar fact pattern, without a disclaimer, could give rise to a duty of care, not only to be honest, but also to be careful. The fact that there was no contract and that the economic loss did not flow from physical damage would not prevent a court from finding such a duty of care.

Hedley Byrne v Heller has been called "one of the most important decisions in negligence law ever rendered by a Commonwealth

court."²⁸ Indeed, it earned its place as one of Lord Wilberforce's trilogy of cases due to the fundamental impact it had in altering negligence law in three important respects: 1) it used Donaghue v Stevenson as a basis for extending negligence liability into areas that had previously been immune, 2) it established a cause of action based on negligent words, not acts, and 3) it was the first to breach the exclusory rule.

In Hedley Byrne, one discovers just how far-reaching were the principles enunciated in Donaghue v Stevenson. Although the proximity or "reasonable foresight" test was not directly employed by the House of Lords, the decision was, however, referred to for its inspirational value.²⁹ The speech of Lord MacMillan was quoted by Lord Hodson:

The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to altering social conditions and standards ... The categories of negligence are never closed.³⁰

As Lord Devlin put it, the "real value of Donaghue v Stevenson ... is that it shows how the law can be developed to solve particular problems."³¹ Lord Reid agreed but with an important qualification: "That decision may encourage us to develop existing lines of authority but cannot entitle us to disregard them."³² However, it has been argued by some that, in overruling Le Lievre v Gould and narrowly interpreting Derry v Peek while relying on Donaghue v Stevenson and the dissent in Candler, this was precisely what the House of Lords in fact did.³³

Of particular importance to professionals was the fact that Hedley Byrne established a duty of care giving rise to an action for

negligent words causing pure economic loss. Lord Hodson saw no insurmountable difficulties associated with liability for negligent words. He stated it is "[t]rue that proximity is more difficult to establish where words are concerned than in the case of other activities ... but these matters go to difficulty of proof rather than principle."³⁴ As for the exclusory rule regarding pure economic loss, Lord Hodson dismissed it with the words, "[i]t is difficult to see why liability as such should depend on the nature of the damage."³⁵ Lord Devlin's comments echoed these views.³⁶

In the course of their decision, the Law Lords set out the circumstances where a duty of care would arise. Lord Morris of Borth-y-Gest put it this way:

I consider that it ... should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words makes no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgement or his skill or his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.³⁷

Lord Hodson expressly concurred with Lord Morris' conclusion that where there is first of all an undertaking and secondly, actual or constructive knowledge of reliance - then a duty of care will arise.³⁸ Lord Reid referred to the case of a "special relationship," "a case where there are special circumstances from which an undertaking to be careful can be inferred."³⁹ This "special relationship" was returned to by Lord Devlin:

[T]here is ample authority to justify your lordships in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include relationships which ... are "equivalent to contract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."⁴⁰

Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer.⁴¹

Although each put it slightly differently, all of their Lordships were grappling with the same two essential issues of negligence law - duty of care and proximity. But whether duty and proximity should be determined on the basis of undertaking and reliance, or special relationships equivalent to contract, or both, the net effect was the same - as a result of Hedley Byrne the law was forever changed. Negligence had made its first inroads into actions arising from economic loss caused by negligent words. But there were limits. The Law Lords clearly saw the far-reaching effects of their decision and its potential to open up professionals to wider liability. This is evidenced in their insistence that some criteria, be it a special relationship, or an undertaking and reliance be met before a duty could be established. For as Lord Reid put it, "[t]here must be something more than the mere misstatement."⁴²

Further limits were placed on this duty of care seven years later by the Judicial Committee of the Privy Council in Mutual Life v Evatt.⁴³ This case involved a plaintiff who was a policy holder in the defendant insurance company. The plaintiff requested information regarding the financial stability of one of the defendant

company's subsidiaries. The defendant replied that the subsidiary was sound. Based on this information, Mr. Evatt invested in the company and lost money.

The majority of the Privy Council held there was no liability in this case noting that in Hedley Byrne and similar cases the statements in question had been made in the ordinary course of the defendants business, and the subject matter called for some special skill which the recipient knew the defendant to have.⁴⁴ Therefore, the action was to be limited to "advisors who carry on the business or profession of giving advice of the kind sought and to advice given by them in the course of that business."⁴⁵ However, this limitation has been rejected by many Commonwealth jurisdictions.⁴⁶

In Canada, limitations of a different sort have been imposed on the duty of care. In Haig v Bamford,⁴⁷ a case involving a negligently prepared audit, the Supreme Court of Canada, in a unanimous decision held that it was not sufficient that the defendant chartered accountancy firm reasonably foresee the use to which the financial statement would be put and the plaintiff's reliance thereon.⁴⁸ Mr. Justice Dickson instead stated that the defendant must have "actual knowledge of the limited class that will use and rely on the statements"⁴⁹ in order to establish a duty of care. In Canada, mere foreseeability alone is not enough. Nor, it seems, are the tests or limits set down in Mutual Life or even Hedley Byrne. Hedley Byrne, though it opened up liability for negligent words causing economic loss throughout the Commonwealth, has not been followed with equal vigour vis-a-vis the limits to be placed on the duty of care.

Although Hedley Byrne was the first to break through and establish an exception to the exclusory rule, other courts did not rush in immediately to take an active role in further assaults upon this long standing rule. It took another decade before this was to happen. In 1974 the Supreme Court of Canada held in Rivtow Marine v Washington Iron Works⁵⁰ that the negligent failure of a duty to warn resulting in pure economic loss was actionable.

Two years later, in 1976, the High Court of Australia created yet another exception to the exclusory rule in Caltex Oil v The Dredge "Willemstad."⁵¹ Here it was held that liability could exist for negligent acts resulting in pure economic loss. The defendant dredge negligently damaged an oil pipeline which did not belong to the plaintiff, but which the plaintiff used to pipe oil from a refinery to their terminals. As a result of the damage, the plaintiff incurred extraordinary expenses in trucking the oil to their terminal. Mr. Justice Gibbs described the conditions necessary to give rise to a duty of care:

In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases where the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him damage by his negligent act.⁵²

Mr. Justice Mason, in a separate decision, expressed a very similar statement of the law.⁵³ Thus, "physical propinquity" became the next exception to the exclusory rule.

In Canada, in 1978, an analagous fact pattern arose in Trappa Holdings Ltd. v Surrey and Imperial Paving Ltd.⁵⁴ In this case a shopowner's business suffered as a result of the negligence of the defendant municipality and a contracted road repair company. The work on the road blocked access to the plaintiff's business, although no property of the plaintiff was damaged.

The B.C. Supreme Court held that, as between the municipality and the plaintiff, a duty of care existed. In his judgement, Mr. Justice Ruttan referred to the fact that the particular plaintiff and his susceptibility to economic loss was well known to the defendants and that as a direct result of their negligence, foreseeable economic loss had resulted. Thus, in Canada, liability became established in negligence for economic loss arising from damage to the property of someone other than the plaintiff where physical propinquity was proved.

Up to this point, the Courts, although allowing certain specified actions in negligence for pure economic loss, had been careful to place limits on the situations where a duty would be found lest, as Cardozo, J. put it in Ultramares Corp v Touche, potential defendants be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."⁵⁵

In his decision in Caltex, Gibbs, J. put it this way:

Further, a law which imposed a general duty to take care to avoid causing foreseeable pecuniary loss to others would, as Widgery J. suggested, interfere greatly with the ordinary affairs of life. There are sound reasons of policy why economic loss should not be treated in exactly the same way as material loss.⁵⁶

If a person committing an act of negligence were liable for all economic loss foreseeably resulting therefrom, an act of careless inadvertence might expose the person guilty of it to

claims unlimited in number and crippling in amount.⁵⁷

The notion of an exclusory rule with specific exceptions was to later be replaced, at least in British Columbia, with the notion of a general inclusory rule in Nicholls v Corp of Township of Richmond.⁵⁸

This 1983 case involved an action for negligently inducing breach of contract. In their decision, the B.C. Court of Appeal dismissed an application to strike out the pleading on the ground that there was no cause of action. Mr. Justice Lambert stated unequivocally:

In short, the law of negligence is now seen as a general law with exceptions, and not as a law of specific instances ... In my opinion such cases as Cattle v Stockton Waterworks Co. and Weller & Co. v Foot & Mouth Disease Research Inst. should be seen as specific examples of a denial of recovery on the basis of absence of proximity, or remoteness of damage, or both, and not as establishing a principle that damages can never be recovered for economic loss ...⁵⁹

This radical departure from previous decisions, Justice Lambert pointed out,⁶⁰ was to a large extent made possible by, and based on, the landmark decision of the House of Lords in Anns v London Borough of Merton.⁶¹

Anns v London Borough of Merton

In 1978 the House of Lords returned to the well of Donoghue v Stevenson once again and this time found in its remarkably fecund waters the raw materials for the creation of the next dramatic and problematic development in negligence law - the prima facie duty of care.

In Anns, an action was brought by occupiers of maisonettes who had suffered damage as a result of faulty foundations. The allegation

as argued in the preliminary point was that the defendant council had either failed to inspect the construction of the foundations or, alternatively, if it had done so, such inspection was negligently performed. The issue was whether or not there was a duty of care. Although Anns involved neither professional negligence as between private persons nor pure economic loss, the ramifications of their Lordship's decision were to extend far beyond the confines of the facts of the case⁶² and would markedly alter how future cases of this sort would be decided.

In the course of his decision, Lord Wilberforce looked back to the speech of Lord Reid in Home Office v Dorsett Yacht.⁶³ In holding that the Home Office was vicariously liable for damage caused by seven borstal boys who were under the care and control of prison authorities, Lord Reid stated that he regarded Donoghue v Stevenson as a milestone.⁶⁴ Furthermore, his Lordship went on to say that

the well known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.⁶⁵

Lord Wilberforce clearly agreed:

Through the trilogy of cases in this House, Donoghue v Stevenson, Hedley Byrne & Co. Ltd v Heller & Partners Ltd. and Home Office v Dorset Yacht Co. Ltd., the position has now been reached that in order to establish that a duty of care arises in a particular situation it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged

wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider 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.⁶⁶

Lord Atkin's "neighbour principle" had now reached its zenith. The ambiguous concepts of "proximity"⁶⁷ and "reasonable foresight" were now the determining criteria for the establishment of a prima facie duty of care. Once established, this duty could only be negated on the basis of "considerations" or policy reasons. This in itself was a breakthrough since as Professor Partlett points out: "[r]arely does one find the judges admitting that they are making policy decisions; they were generally reluctant to look beyond legal formulations".⁶⁸

Lord Denning, however, was not quite so hesitant. In 1973 in Spartan Steel v Martin & Co. he had considered precisely such an approach, although he would not have been quite so favorably impressed with Lord Wilberforce's test for determining the existence of a prima facie duty.

The more I think about these cases, the more difficult I find it to put each into its proper pigeon hole. Sometimes I say "There was no duty." In others I say "The damage was too remote." So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand and see whether or not, as a matter of policy, economic loss should be recoverable or not.⁶⁹

Despite Lord Denning's misgivings, as a result of the Anns decision there was now a new test for establishing liability, one that recognized no pre-established grounds for liability and was so general or universal in its language that courts found it readily applicable to new situations. This concept, although criticized as "a device whereby courts are enabled to exercise a discretion as to the creation of legal liability ... [which] need not be justified in terms of precedent or principle relating to well-recognized grounds of civil obligation,"⁷⁰ soon found favour in other Commonwealth courts.

The first indication of this willingness to accept and apply the notion of a prima facie duty of care came from the New Zealand Court of Appeal in Scott Group v McFarlane.⁷¹ In this case the successful makers of a take-over bid sued the accounting firm which had negligently overstated the assets of the target company. The claim, based on negligent misrepresentation, failed. However, two of the three presiding judges held that there was a duty of care.⁷²

In rejecting the duty of care Richmond, P. applied the test set out in Hedley Byrne and decided that:

[I]t would be going too far to treat accountants as assuming a responsibility towards all people dealing with the company or its members in reliance, to some greater or lesser degree, on the accuracy of the accounts merely because it was reasonably foreseeable, in a general way, that a transaction of the kind in which the plaintiff happened to become involved might indeed take place. The relationship between the parties would, I think, be too general and not sufficiently "special" to come within the principles underlying the decision in Hedley Byrne.⁷³

Two years prior to the Anns decision the Supreme Court of Canada in Haig v Bamford⁷⁴ anticipated Richmond, P's comments. Dickson,

J. speaking for a unanimous court, said that in order to establish a duty of care between accountants and third parties there must be actual knowledge of the limited class that will use and rely on the statement.⁷⁵ Reasonable foresight on its own was not enough.

However, for the rest of the New Zealand Court of Appeal, reasonable foresight was sufficient. Referring specifically to Lord Wilberforce's speech in Ann's, Woodhouse, P. stated that his Lordship would "test the sufficiency of proximity simply by the reasonable contemplation of likely harm. And, with respect, I do not think there is any sound reason in favour of a more restrictive approach."⁷⁶ Cooke, J. similarly held a duty of care to exist.⁷⁷

Another early, and arguably extreme, application of the Ann's formulation was made by the High Court of Australia in Wyong Shire Council v Shirt.⁷⁸ Having decided that an unlikely risk of injury may nevertheless be foreseeable, Mason, J. went on to discuss the nature of "foreseeability."

A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v Stone may nevertheless be plainly foreseeable. Consequently, when we speak of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one which is far fetched or fanciful ... [I]t certainly does not follow that a risk which is unlikely to occur is not foreseeable⁷⁹

The next significant professional liability case decided under Ann's was Ross v Caunters,⁸⁰ a decision of the English Chancery division. This case involved an action brought by a third party beneficiary under a will against a solicitor who negligently allowed the will to be improperly witnessed, thereby invalidating the will and

the beneficiary's interest in it.⁸¹

Had the action been brought in negligent misrepresentation as in Hedley Byrne the suit could not have succeeded. The requisite elements of undertaking, reliance, and a "special relationship" were all lacking. However, Sir Robert Megarry V.C. applied the Anns test and held that "prima facie a duty of care was owed by the defendant to the plaintiff because it was obvious that carelessness on their part would be likely to cause damage to her."⁸²

The fact that there was no reliance was not held to be significant as a limiting factor because the class of potential plaintiffs was necessarily limited by the terms of the will. And, moreover, it was held that "the true basis for liability flows directly from Donoghue v Stevenson and not via Hedley Byrne."⁸³ And therefore, "there is no need to consider questions of reliance."⁸⁴

More importantly, in Ross v Caunters Megarry, V.C. clearly overruled Groom v Crocker and in doing so dramatically extended a solicitor's liability in negligence.⁸⁵

Despite ... what was said in Groom v Crocker and other cases in that line, there is no longer any rule that a solicitor also is negligent in his professional work can be liable only to his client in contract; he may be liable both to his client and to others for the tort of negligence ... a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party owes a duty of care to that third party in carrying out that transaction ... The mere fact that the loss to such a third party is purely financial ... is no bar to the claim against the solicitor.⁸⁶

The British Columbia Court of Appeal in Tracy v Atkins⁸⁷ endorsed the notion of a prima facie duty of care and pointed out that "proximity" in cases involving professionals should no longer be

limited to "special relationships" as set out in Hedley Byrne. In the course of deciding that a solicitor was liable in negligence for failing to look out for the interests of the plaintiff vendors while acting for the purchaser, Chief Justice Nemetz said,

I should add that in my view the special relationship said to arise when one person relies on the skill of another who undertakes to apply that skill for his assistance is no more than a particular way of establishing a degree of proximity on which a duty of care may be founded.⁸⁸

This same approach was employed in Yianni v Edwin Evans & Sons,⁸⁹ to establish that a valuer or surveyor may owe a duty of care to a third party, and in J.E.B. Fasteners Ltd. v Marks Bloom & Co.⁹⁰ to determine the existence of a similar duty of care between an auditor/accountant and a third party. In this case, "constructive" reasonable foreseeability was equated with actual knowledge.⁹¹

At this point in the evolution of the law of negligence a number of developments had become firmly established. First of all, the exclusory rule barring actions for pure economic loss had taken a severe beating. So many exceptions had been judicially approved of that the authority of that rule was very much in question. The Hedley Byrne exception for negligent misstatement had opened the way for actions against professionals while at the same time its requirements that there be an undertaking, reliance, and a special relationship equivalent to a contract had become relegated to no more than "a particular way of establishing a degree of proximity on which a duty of care may be founded."⁹² The test had instead become that of proximity based on reasonable foreseeability as set out by Lord Wilberforce in Anns.

Cooke, J., in Gartside v Sheffield Young & Ellis⁹³ indicated to what extent the exclusory rule had fallen into disuse. Referring to the case of Allied Finance v Haddow,⁹⁴ he stated:

That case is also a recent illustration of a proposition which is now well settled - that the mere fact that the only damages either likely to be suffered or are in fact suffered are purely economic does not necessarily rule out a duty of care. At best it is a factor which may in some cases tell against a duty or limit the scope of liability.⁹⁵

In Canada or, more specifically, in British Columbia, there would appear to be no exclusory rule at all as a result of the B.C. Court of Appeal decision in Nicholls v Corp. of Township of Richmond⁹⁶. As noted above, Lambert, J.A. put it quite succinctly when he said, "In short, the law of negligence is now seen as a general law, with exceptions, and not as a law of specific instances."⁹⁷

While the exclusory rule became less and less of a limiting factor in determining the availability of negligence actions, the prima facie duty of care doctrine enunciated in Anns proliferated throughout the Commonwealth. The law of negligence, it appeared, was in full stride, its ambit ever-increasing. Reasonable foreseeability and proximity were reaching their apotheosis as courts took advantage of the latent ambiguity of these terms to create novel duty relationships. But why? Professor Partlett argues that it was much more than the mere evolution of the Common Law:

But more fundamentally an altered judicial attitude has been at the fulcrum of these changes. The demand was felt by the courts for wider recompense for negligently inflicted harm. This was founded on the proposition that it was fatuous to believe that individuals could adequately protect themselves against the consequences of bodily or property damage. Thus there followed a call for compensatory justice, a particular form of corrective justice: the rendering to a person of redress for the violation

his or her - rights by another. The moral dimension in Lord Atkin's dictum was potent in moving courts to take bold stances. The neighbour principle facilitated this judicial decision making. The very simplicity and the universality of the principle, rather than its intellectual power, made it readily applicable to new situations.⁹⁸

Other observers have noted how this altered judicial attitude has facilitated a unique, and arguably incomplete, decision making process. Burns and Smith point out that since the prima facie duty doctrine assumes the existence of the duty, it

... need never be justified. One need then only show in terms of utilitarian calculus, economic analysis, political ideas of fairness or a religious sense of right and wrong, dressed up in the amorphous language of public policy, that the defendant ought to have done what he failed to do, so the unjustified prima facie duty is confirmed.

The consequence of this is that

the ultimate cost bearing issue is shifted from the legal question of the existence of a duty, to the factual questions of standard of care. This is because only the most overwhelming argument in terms of such prima facie duty of care being negated by policy will persuade a court to reject the plaintiff's case at this point.⁹⁹

It seemed that negligence law was irrevocably bent upon its course. However, one ineluctable axiom of the law is change. Forces would come to bear that would shift this course and slow its advance. Limitations on duty relationships would be called for and set down and reasonable foreseeability would lose its patina and its nimbus would begin to fade.

The interpretation and application of the Anns prima facie duty of care doctrine by the courts discussed above did not meet with universal approval. In 1982, the majority of the Victorian Supreme Court in Seale v Perry¹⁰⁰ saw distinct problems with the

prevailing interpretation of Lord Wilberforce's comments. Lush, J., referring to the passage in which his Lordship sets out the prima facie duty doctrine, stated:

In my opinion, in the light of its origin in Lord Reid's statement and of the authorities which Lord Wilberforce cited, the passage which I have quoted cannot be read as meaning that the possibility of foreseeing damage by itself establishes "proximity" which in turn establishes a duty of care.¹⁰¹

Interestingly, it appears that Lord Wilberforce may have agreed with Lush, J., at least in part. In 1982 in McLoughlin v O'Brian,¹⁰² a case involving an allegation of negligent infliction of nervous shock, his Lordship, in the course of deciding in favour of the plaintiff, stated "[t]hat foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear."¹⁰³ He went on to cite with approval Lord Reid's comments in McKew v Holland & Hannen & Cubitts Ltd.¹⁰⁴

A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.¹⁰⁵

Lord Wilberforce's comments in McLoughlin v O'Brian had an effect undoubtedly undreamt of by his Lordship. In a number of later Commonwealth cases they were cited as a justification for criticizing the prima facie duty doctrine set out in Anns, specifically the use of "reasonable foreseeability" as the sole criterion for establishing even on a prima facie basis, the duty of care.¹⁰⁶

The facts in Seale v Perry were very similar to those in Ross v Caunters. However, in Seale v Perry the majority came to a quite different conclusion and held that the solicitor owed no duty of care to the intended beneficiaries. Indeed, Murphy, J. noted that his

opinion on this subject was directly contrary to that of Megarry, V.C.¹⁰⁷ and went on to state:

The present case is one, as Megarry, V.C. points out, in which what he characterized as "financial loss is directly caused by the solicitor's breach of that duty, and reliance by the plaintiff is irrelevant." But this statement may beg the question, Is there a duty? Reliance is one of the vital considerations to look for before answering this question; not after it has been answered by assumption.¹⁰⁸(italics are my own)

Seale v Perry was one of the earliest cases to question reasonable foreseeability as the basis for establishing proximity and the prima facie duty of care. But, more importantly, it was one of the first to point out that the prima facie duty doctrine appeared to put the cart before the horse, in that the legal question of the existence of the alleged duty relationship was assumed after looking at reasonable foreseeability. In fact, Lush, J. proposed a new test determining the existence of the duty, a test which did not depend solely on reasonable foresight.

A duty, however, cannot exist by itself. To the duty seen as imposed on the defendant, there must be a correlative right in the plaintiff: for either to exist, both must be capable of being identified.

It is possible that this proposition is at the root of the reluctance of the common law, evident for a long time, to recognize purely economic loss as a form of damage recoverable in an action for negligence.¹⁰⁹

This reluctance to focus on reasonable foresight exclusively and to assume the duty relationship was, as will be seen, the beginning of what might be termed a trend in judicial thinking as the courts started to pull back from Anns and instead began to turn their minds to the legal question of the existence of the duty before proceeding with the

next step in a negligence action.

Before leaving Seale v Perry, there are two more comments of the majority that should be noted. First, Murphy, J. stated that, despite the decision in Ross v Caunters, in his opinion "Hedley Byrne v Heller did not overrule nor undermine the foundation of Groom v Crocker."¹¹⁰ A solicitor, however, might still be liable under the Hedley Byrne principle if no contract could be established. But the criteria would remain: undertaking, reliance and a special relationship equivalent to contract.¹¹¹ Reasonable foresight would on its own not be sufficient to establish the duty, the duty would have to be established on its own merits.

Secondly, Murphy, J. returned to Donoghue v Stevenson and Lord Atkin's reference to Luke's parable of the Good Samaritan - to illustrate his difficulty with the proposition that a solicitor owed a duty of care based on reasonable foresight and proximity to a third party who is brought to his notice fortuitously. Murphy, J. stated that this proposition

involves that, if the Good Samaritan had gone past, but later engaged for reward a charioteer plying his trade, instructing him to carry the man in the gutter to his (the Good Samaritan's) abode and if the charioteer breached his contract with the Good Samaritan by failing to go near the man in the gutter, the man in the gutter could sue the charioteer for breach of a duty that the charioteer owed to him to take care in the performance of his contract. He would "be so closely and directly affected by his (the charioteer's) acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions" ... This appears to me to involve a legal heresy.¹¹²

The Victorian Supreme Court was not the only Commonwealth court to point out the problems associated with focusing on reasonable

foreseeability as determinative of a duty of care, particularly as regards a third party.

The New South Wales Court of Appeal expressed similar sentiments in denying recovery in Minister for Environmental Planning v San Sebastian Pty.¹¹³ The state planning authority prepared a redevelopment study of an area of Sidney. The report contained no assurances of feasibility or implementation. The plaintiff, in reliance on the study (which was placed on public display) bought land in the area. The plan ended up being unfeasible because of a shortage of transportation facilities. No redevelopment permits were issued. The plaintiff sued the planning authority for negligence in preparation of the plan.

Mr. Justice Hutley elaborated on the problems inherent in allowing a third party to sue for a negligently performed contract:

Suppose A draws a contract for B, which he knows to be executed by B and C, C having no independent legal advice. The contract is, to the knowledge of A, wholly in accordance with his instructions from B, but is extraordinarily harsh, although perfectly legal and may foreseeably in certain events allow B to ruin C. Does A have any duty to draw the contract otherwise or to warn him of its perils? If, by a legal error on his part he increases C's burdens under the contract can C sue him? In my opinion the answer must be no. There comes a time when the genie released by Lord Atkin must be put back in the bottle.¹¹⁴

In 1984, the High Court of Australia in Jaensch v Coffey¹¹⁵ focussed their attention on reasonable foresight. Gibbs, C.J. noted his agreement with Lord Wilberforce's observation in McLoughlin v O'Brian that "foreseeability does not of itself and automatically, lead to a duty of care."¹¹⁶

Deane, J. elaborated on this point:

Overall, one cannot but be conscious of the emergence of a common, although mistaken, tendency to see the test of reasonable foreseeability as a panacea and, what is of more importance for present purposes, to refer to it as if it were, from the viewpoint of principle, the sole determinant of the existence of a duty of care.

Given the circumstances of a particular case, the question whether a common law duty of care exists is a question of law ... The requirement of a relationship of "proximity" in that broad sense should, in my view, be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care.¹¹⁷

While calling out for limits or controls on the prima facie duty of care doctrine, Deane, J. also attempted to reconcile his views with those of the court in Wyong Shire Council v Shirt noted above and Lord Wilberforce in Anns. This he did by distinguishing between physical damage and pure economic loss.

"[A]n equation between reasonable foreseeability of injury and a duty of care under the law of negligence can be accepted in cases involving ordinary physical injury ..."¹¹⁸ (italics are my own). Whether or not such a distinction would hold sway in other courts is doubtful. Indeed, at perhaps the height of the expansionist era in England, the House of Lords, in Junior Books v Veitchi showed that they were willing to apply Wilberforce's dicta to cases involving no physical damage to the plaintiff. Deane, J's attempt to limit the use of the prima facie duty doctrine indicates the lengths to which this court was willing to go to place limits on the doctrine without overruling themselves in Wyong Shire or expressly disagreeing with the House of Lords in Anns.

However, the House of Lords themselves had occasion to re-examine

the prima facie duty doctrine in the 1984 case Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.¹¹⁹ In doing so their Lordships took a large step toward restricting the duty of care through their re-evaluation of Lord Wilberforce's words and their inclusion of an additional criterion to the duty test.

The case was concerned with determining whether the defendant council owed a duty of care to the plaintiff housing developers to take action when one of its drainage inspectors had knowledge that the actual drainage system being installed was different from that called for in the plans. As it turned out, the new drains were inadequate and their re-construction and attendant delays caused the plaintiffs considerable losses. The House of Lords held that no duty of care was owed.¹²⁰

In the course of his decision, Lord Keith of Kinkel looked back to the oft-cited speeches of Lord Atkin in Donoghue v Stevenson, Lord Reid in Dorset Yacht v Home Office and Lord Wilberforce in Anns and commented,

There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for ...[And] in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.¹²¹

With these words the House of Lords applied important restrictions to the ambit of the prima facie duty principle. It was now clear that it was the nature of the alleged duty relationship itself that must be examined. Reasonable foreseeability was an important element

to be looked at - but not the only one. The reasons enunciated in such cases as Anns, Ross v Caunters and Wyong Shire Council v Shirt identifying reasonable foreseeability as the sole test of liability¹²² no longer appeared to be correct statements of the law. Additionally, the House of Lords had put other courts on notice that in deciding the legal question of the existence of a duty of care it was now necessary to determine whether it would be "just and reasonable" to do so.

This was a dramatic departure from their Lordships decision six years earlier in Anns. Rather than reasonable foresight establishing proximity and a prima facie duty of care, potentially negated only by policy reasons; the Court now endorsed a judicial process wherein the duty issue is examined first. This was to be done by looking at all relevant facts including, but not limited to, reasonable foresight, proximity, policy reasons, and now, a "just and reasonable" test. Clearly the focus had shifted away from an expansion of negligence law. Judicial activism was being replaced by judicial restraint. The onus was no longer on the defendant to rebut the assumed duty of care. Once again it was up to the plaintiff to establish that such a duty did in fact exist and to show that it was just and reasonable that the court recognize its existence.

The English courts were not content with simply adding limits to the ambit of Lord Wilberforce's decision. They also managed to restrict the situations in which a duty of care would be imposed where the loss suffered is purely economic. In Candlewood Navigation Corp. v Mitsui OSK Lines (The Mineral Transporter)¹²³ the Judicial Committee of the Privy Council, (sitting with two of the same Law Lords as sat on

the Peabody case),¹²⁴ mindful of the warning in Peabody, decided that "some limit or control mechanism has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence."¹²⁵ Moreover, their Lordships appear to have advocated a return to the exclusory rule as set out in Cattle v Stockton Waterworks¹²⁶ and in doing so labelled Caltex as an exception to that rule.¹²⁷

In reaching their decision that the plaintiff, who had no property in the damaged goods, could not recover in a claim for economic loss, the Privy Council obviously did not consider that the earlier House of Lords decision in Junior Books v Veitchi¹²⁸ set out a principle that pure economic loss could be recovered in tort based on an application of the reasonable foresight test. Junior Books was later expressly challenged by Peabody and its addition of the "just and reasonable" test. The English Court of Appeal, in Muirhead v Industrial Tank¹²⁹ dealt it a further blow in holding that, in light of the recent pronouncement of the House of Lords in Peabody, Junior Books should be regarded as restricted to its facts.

In the recent High Court of Australia decision in The Council of the Shire of Sutherland v Heyman,¹³⁰ Gibbs, C.J. clearly preferred the decision in Peabody to that of Anns.

[I]n my opinion [Lord Wilberforce] did not mean to say in Anns v Merton London Borough Council, that foreseeability alone is sufficient to establish proximity or neighborhood, and consequently to establish the existence of a duty of care ... However, in my respectful opinion the principle was correctly stated by the House of Lords in Peabody Fund v Sir Lindsay Parkinson.¹³¹

Mason, J. concurred,¹³² as did Brennan J.A.,¹³³ the majority of the court holding that the defendant municipality did not owe a duty of care to the plaintiff home owners. In the course of his speech, Brennan J.A. set out his views as to how negligence law should evolve.

It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "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."¹³⁴

It is submitted that these words accurately reflect the prevailing current judicial attitude, as the courts move further away from the wide open prima facie duty doctrine of Anns, toward a more conservative concept of the duty of care relationship.

In 1986 the House of Lords again had the opportunity to consider the question of duty of care in negligence law, and again the prima facie duty doctrine of Anns was criticized. The case was Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd.¹³⁵ In it their Lordships held that buyers under a contract of shipping, who assumed risk of damage but had not yet become legal owners of certain goods, could not sue the defendant shipowner in negligence for damage occurring to those goods in the course of carriage.

Lord Brandon of Oakbrook, who also was a member of the court in both the Peabody Fund and Candlewood cases, stated that Lord Wilberforce's speech in Anns

does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence

... He was not ... suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had been repeatedly held not to exist.¹³⁶

The import of all of these recent decisions is clear. The prima facie duty doctrine no longer appears to be the law. In each decision of these senior Commonwealth courts the same point is made again and again. Reasonable foreseeability cannot now be the sole determinant of a duty of care. The duty question is a question of law and must be settled by the Court with regard to a number of factors, reasonable foreseeability and proximity being only two. Additionally, the courts must decide if the imposition of a duty in a particular situation would be "just and reasonable." As well, any policy reasons why the duty should be negated must be considered by the Court. All of this must take place before the factual issues of the standard of care and its alleged breach are dealt with.

The Courts have also clearly evidenced an inclination to return to the exclusory rule of Cattle v Stockton Waterworks, albeit with certain specified exceptions such as those identified in Hedley Byrne, Rivtow Marine and Caltex. The B.C. Court of Appeal decision in Richmond v Nicholls would therefore appear to be anomalous and not indicative of prevailing judicial attitudes.

It is important to remember that in England the law of negligence developed against a backdrop quite different from that in Canada. In English courts deciding negligence cases the trier of fact is always a judge; there are no jury trials. Whereas in Canada the defendant may exercise his or her option to be tried before a jury. The practical

realities of this difference are worthy of note.

In England, the adoption of Lord Wilberforce's prima facie duty doctrine had a less deleterious effect because the legal question of the duty, once established, could always be negated by policy reasons, or recovery could be denied on the basis of questions of fact such as remoteness of damage or no breach of the standard of care. This was because questions of law and questions of fact are decided by the same person - the judge.

In Canada, however, once the legal question of the existence of the duty is decided, the remaining factual questions can go to a jury for consideration. This means that a doctrine such as the prima facie duty of care offers the judge less of an opportunity to deny recovery after the duty is established. The return to a more stringent set of rules for establishing a duty relationship in conjunction with the re-emergence of the exclusory rule will enable Canadian judges to regain control over the ambit of liability in negligence law in this country.

As Canadian courts followed the rest of the Commonwealth in adopting the Anns formulation, this important distinction between the jurisdictions was seemingly overlooked or ignored. The potential for quantum leaps in the extension of liability in this country was always greater than in England. The recent developments in negligence law beginning with Peabody and running through the Aliakmon case, however, should limit such a possibility. As a consequence, a greater degree of predictability should return to this area of the law. Such a prospect can only be looked forward to.

These recent developments notwithstanding, the extensions of professional liability in negligence have, however, already had a dramatic effect on the business of being a professional. The impact has been most profoundly felt by all professions in the area of insurance. What has been labelled by some as a "crisis" in professional liability insurance is the subject of the next section of this paper.

II The Insurance Crisis: The Pathology of a Contrived Market?

In steadily increasing numbers over the past few years, professionals have found themselves defendants in a variety of negligence actions. As we have seen above, the examples are numerous. For instance, an auditor whose negligently prepared financial statement becomes the basis on which a successful take-over bid is launched, could be held liable for the amount of the mis-stated worth of the target company.¹³⁷ A lawyer who negligently prepares a will may now be found to have a duty of care to a third party beneficiary for the entire amount of the void testamentary gift.¹³⁸

In an effort to protect themselves, many professionals have, quite naturally, sought out the safety of liability insurance. This fact, however, has led to the posing of a provocative question:

[Will] the presence of insurance, and the community understandings that professionals carry it, . . . stimulate broader litigation and hence enhance the probability of liability[?]¹³⁹

Many would agree that such is indeed the case. Professor Partlett is one of them:

There is a vicious circle between liability and insurance. The institution of insurance follows the law - it insures the risk of legal liability. But simultaneously, the law may follow the institution of insurance by seeking to impose wider liability in the presence of insurance . . . It cannot be doubted that insurance liability has fuelled the expansion of negligence liability for personal injury . . . Its presence in professional liability will likely do the same.¹³⁹

Lord Denning M.R., in his book In the Discipline of Law, turned his mind to a consideration of this situation:

During this discussion, I have tried to show you how much the law of negligence has been extended; especially in regard to the negligence of professional men. This extension would have been intolerable for all concerned - had it not been for insurance. The only way in which professional men can safeguard themselves - against ruinous liability - is by insurance. In most of the cases that come before the courts today, the parties appear at first sight to be ordinary persons or industrial companies or public authorities. But their true identity is obscured by masks. If you lift up the mask, you will usually find the legal aid funds or an insurance company or the tax payer - all of whom are assumed to have limitless funds. In theory the courts do not look behind the mask. But in practice they do. That is the reason why the law of negligence has been extended so as to embrace nearly all activities in which people engage. That is the reason the award of damages have escalated so as to exceed anything that even the wealthiest individual could pay. The policy behind it all is that, when severe loss is suffered by anyone singly, it shall be borne, not by him alone, but be spread throughout the community at large.¹⁴⁰

There is much evidence that, as Lord Denning opined, courts today do indeed take the fact of insurance into consideration both when deciding the existence of a duty of care and the quantum of damages. Of course such considerations are, of necessity, rarely expressly referred to in decisions. However, on occasion, the court will clearly state its views on the insurance question.

Lord Denning himself, sitting on the Court of Appeal in Launchbury v Morgans,¹⁴¹ provided a valuable insight into the judicial decision-making process in determining liability in a motor vehicle accident case:

On all these occasions, her husband ought to bear the responsibility, especially as he is the one who is, or ought to be, insured. He ought, as most husbands do, to take out a comprehensive insurance . . . if he does not do so, he has only himself to blame. I realize, of course, that this point of insurance is only by the

way. We are here to state the common law, not the law of insurance. And at common law, I hold that the husband . . . must shoulder the responsibility.¹⁴²

I know that this matter of insurance is of no direct concern in this case, but, as it is of such practical importance, I feel it only right to mention it.¹⁴³

Lord Denning, however, was not the only one to expressly recognize what many have suspected to be the case - that questions of liability and damages are indeed based, in part, on the assumption that certain defendants, and especially professionals, are, or should be, protected by the "deep pockets" of insurance.

Richardson, J. of the New Zealand Court of Appeal enunciated just such a point of view in Allied Finance v Haddow & Co:¹⁴⁴

[To] the extent that the action in negligence is a loss allocation mechanism, there is much to be said for the view that where in relationships of proximity laymen rely on the advice of professionals, the costs of that careless advice should be borne by the professional advisers who are in a position to protect themselves by professional negligence insurance and in that way to spread the risk.¹⁴⁵

Richardson, J. stated essentially the same point again in Gartside v Sheffield, Young & Ellis,¹⁴⁶ a case involving the liability of a solicitor to a third party beneficiary.

McGarvie, J. in Seale v Perry¹⁴⁷ appeared to concur with the views of Lord Denning noted above. He stated that the "law does pay regard to the likely presence of insurance in deciding where fairness lies as between classes of persons in the bearing of a loss."¹⁴⁸

As examples of this proposition, McGarvie cited the cases of Dutton v Bognor Regis Urban District Council¹⁴⁹ and Photo Production Ltd. v Securicor Transport Ltd.¹⁵⁰ He went on to observe that, in his

opinion, a "solicitor carrying on a practice is likely to have liability to beneficiaries covered by insurance, as well as liability to clients"151

It is submitted that, as we shall see, such a "likelihood" may have been the case in 1981 or 1982 when Seale v Perry was decided, but that in Canada, today, the same assumption is much less "likely." Moreover, the ability of professionals to protect themselves against risk by professional negligence insurance, noted above in the comments of Richardson, J., has recently become more difficult in that it is not only prohibitively expensive in some cases, but simply unavailable in others. To underscore this point, the following portion of this paper will present a brief survey of the current state of liability insurance vis a vis professionals. This is done with a view to encouraging the courts to re-think those assumptions regarding liability insurance, especially as they impinge upon the decision-making process in determining a duty of care and extending the ambit of the law of negligence. Indeed, Lord Denning may have foreseen the present situation when he wrote:

I sometimes wonder whether the time has not come - may indeed be already with us - when the courts should cry Halt! Enough has been done for the sufferer. Now remember the man who has to foot the bill - even though he be only one of many.¹⁵²

Lawyers

The first year in which liability insurance was made mandatory for British Columbia lawyers was 1971. Due to liability insurance's

"long tail," that is also the last year for which final settlement figures are available. In 1971, there were a total of 58 claims alleging negligence on the part of B.C. lawyers. The entire dollar value of claims paid was \$73,286. Five years later, in 1976, this had climbed to 215 reports and an estimated claims paid of \$925,654. 1981 saw 380 claims filed, resulting in payouts and reserves held of \$3,730,000. For 1986, actuaries project claim totals to reach well over \$6 million. In only fifteen years, the dollar value of negligence claims paid against B.C. lawyers has increased almost eighty-five times.

This startling increase in negligence actions and damage awards has resulted in a commensurate leap in the cost of insurance premiums, attended by a proportionate reduction in coverage. In 1971, lawyers in B.C. paid \$150 annually for \$100,000 of coverage. Liability insurance was affordable and easily obtained. By 1983, premiums were \$670, subject to a \$5,000 per member deductible; and by 1985, the annual fee had risen to \$1,010. For this price, litigation costs were a part of the package.

As costs rose, the numbers of insurers offering professional liability insurance to lawyers dwindled. In 1982, the Law Society of B.C. received twelve quotations on coverage and premiums from insurers. By 1985, things had changed markedly. Sixty-five insurance companies were approached, but only two quotations were tendered. The liability insurance market for lawyers was quickly drying up.

The current situation for B.C. lawyers is this: yearly premiums now average \$1,750,¹⁵⁴ coverage is \$200,000 per occurrence up to an

annual aggregate per member of \$400,000, and the deductible is \$5,000 for the first claim, subsequent claims being subject to a deductible of \$10,000. This plan, however, is only partially administered by a private insurance company. The first \$100,000 of claims is actually self-insured. Private commercial insurance only extends to the second \$100,000.

Had the Law Society of B.C. opted instead for full private insurance coverage, the annual premium would have jumped to \$3,700 for a coverage limit of \$200,000, or \$2,900 if party and party costs were excluded. It must be noted that the cost of litigation was expressly excluded from these quotations. According to the Law Society's Director of Insurance and Loss Control, this exclusion effectively amounted to almost a fifty percent reduction in coverage. In other words, half the coverage for three to four times the cost.

Of interest is the fact that even with these substantially altered terms, the quoting insurers reserved to themselves the right to a ninety day notice of cancellation period. British Columbia lawyers, therefore, could very well face the prospect of being unable to obtain any private insurance at all, should the last two insurers in the market exercise their option to cancel.

Excess insurance coverage is an option that many law firms are cutting back on or, in some instances, eliminating altogether. In previous years, it would not be uncommon for most of the larger firms to carry up to \$200 million worth of coverage. However, dramatic premium increases coupled with insurers' unwillingness to provide such high limits has made such coverage less popular today.

Lawyers in most other Canadian provinces¹⁵⁵ have experienced similar difficulties vis a vis liability insurance. However, to date, Manitoba is the only province where the Law Society has decided to forego private insurance altogether in favour of providing coverage for its members solely from a special self-insurance fund. Citing premium increases which were felt to be "excessive in relation to the number of claims against lawyers in the province,"¹⁵⁶ Manitoba lawyers embarked upon this singular course of action.

In 1985, Manitoba lawyers were charged \$915 annually to fund an insurance scheme similar to that currently in place in British Columbia. However, to renew that coverage in 1986 the premium would have risen to \$1,600 per member. Instead, it was decided to start up a fully self-administered fund with yearly fees of \$1,000. While the Law Society acknowledges that they are running greatly increased risks with "self-insurance," they point out that these risks are balanced somewhat by the fact that "the move will benefit clients by saving lawyers from having to increase their fees to cover skyrocketing insurance costs."¹⁵⁷

As will be seen, the problems faced by Canadian lawyers are not unique among professionals.

Accountants¹⁵⁸

Any assumption that all accountants carry liability insurance is, quite simply, incorrect. Insurance is not a mandatory prerequisite to

the practice of accounting in British Columbia and, in fact, as many as twenty-five percent of chartered accountant firms in this province are not insured against liability for errors or omissions.¹⁵⁸

With the dramatic extension of the liability of accountants, especially to third parties,¹⁵⁹ many insurers have become increasingly less enamoured with this particular field of liability insurance. Indeed, private insurance companies have departed the market in droves citing the fact that as of the Fall of 1985, claims paid amounted to approximately one hundred and seventy-nine percent of the paid premiums. Accountants are viewed by the insurance industry as a high risk, money-losing business proposition.

Currently there is only a single insurance company offering liability insurance to chartered accountants working in small and medium sized firms. Certified general accountants find themselves in much the same position as chartered accountants. However, registered accountants and registered industrial accountants are much worse off. They have been unable to obtain any liability insurance.¹⁵⁸ A successful lawsuit against these accountants would necessitate payment from the individual's own pocket. Without the "deep pockets" of insurance, one large damage award could spell financial ruin.

For those fortunate enough to find a willing insurer, premiums have increased, on average, over one hundred percent. And, as with lawyers, these insurance policies include a ninety day notice of cancellation period. Should this notice of cancellation be given, the ranks of the uninsured accountants would swell.

Directors and Officers¹⁶⁰

In the recent report of the Ontario Task Force on Insurance, it was noted that:

directors' and officers' insurance is virtually unavailable . . . only two insurers in North America - one in Ottawa - continued to supply that coverage. One company that had not had a claim filed against it had its coverage cut from \$75 million to \$15 million over two years and its premiums raised from \$60,000 to \$650,000.¹⁶¹

Examples of this sort abound. Recently, in March 1986, a large Canadian bank attempted to renew its existing three year old directors' and officers' (D & O) insurance policy. The expiring policy had provided a coverage limit of \$50 million with a \$150,000 deductible. The renewal policy was quite different, however. Coverage was slashed to \$15 million, while the deductible rose four hundred percent to \$750,000. And the annual premium for the new coverage? An increase of approximately one thousand percent.

In another instance, a regional Canadian bank was faced with even more onerous problems. In early 1986 its insurer cancelled its D & O policy. That policy had provided a \$25 million coverage limit with a corporate reimbursement deductible of \$50,000 for an annual premium of \$22,900. The renewal coverage limit dropped to \$5 million and the deductible jumped to \$200,000. The additional premium for reinstating the \$5 million limit for one year was equal to the return premium for the cancelled excess limit of \$20 million. As well, the renewal policy eliminated coverage to all employees; losses arising from directors or officers serving on other corporate boards as a part of assigned duties was no longer provided for, and the notice of cancellation period

shrunk from sixty days to thirty. The final blow was struck in March of 1986 when the insurer exercised its right of cancellation. As a consequence, this bank is currently (as of August, 1986) operating without any D & O liability insurance of any kind.

One can only assume that recent calls for the relaxation of the rules regarding derivative actions¹⁶² have failed to appreciate the extent of this current crisis in D & O liability insurance. Clearly "deep pockets" are becoming harder to find as the situation worsens.

Engineers

Other professional groups have been similarly affected. The Association of Professional Engineers of Ontario has stated that at least sixteen percent of its membership is unable to afford liability insurance. Moreover, in 1985 an additional fifteen percent did not carry errors and omissions insurance, claiming that the high costs threatened the viability of their businesses.¹⁶³ However, this fact has apparently not prevented actions from being initiated against engineers in this province. In 1985, the executive director of the Consulting Engineers of British Columbia noted that one engineering firm, which had \$2.5 million insurance coverage, was being sued for \$3.5 million.

Architects

Architects have the same story to tell. In 1985, insurance rates used to average \$2 for every \$100 in gross fees. Now, according to the president of the Ontario Association of Architects, some member firms are paying as much as \$12. "One architect from a medium sized company said he used to pay \$4,500 for \$2 million of coverage last year. The firm raised his rate to \$25,000 but has since gone out of business."¹⁶⁵ There is now only one insurance firm left providing coverage to architects. Their average premium rate is approximately \$16,000 annually. Its not surprising then that about half of all the architects in the province of Ontario reportedly do not carry any insurance.¹⁶⁶ They are willing to take the risk rather than pay what they feel to be exorbitant premiums for very limited coverage.

Liability insurance for other professionals such as real estate agents, stock brokers, auctioneers, and appraisers, is equally difficult to obtain. For some, it is impossible. For instance R.I.B.C. appraisers cannot purchase liability insurance at any price unless they are affiliated with the Appraisal Institute of Canada. No local insurance firm is willing to underwrite the business.

Municipalities

Although municipalities have not been the focus of this paper, since their liability only infrequently sounds in pure economic loss,

their plight as regards liability insurance is instructive. As a result of such cases as Windsor Motors v Powell River,¹⁶⁷ Royal Anne Hotel v Village of Ashcroft,¹⁶⁸ Trappa Holdings v Surrey,¹⁶⁹ Nicholls v Richmond,¹⁷⁰ and Kamloops v Nielsen¹⁷¹, municipalities have increasingly found themselves the subject of actions in negligence, some of which have included claims for pure economic loss.¹⁷² Municipalities have in recent times been viewed as "deep pockets" and consequently are generally named in actions on the basis of joint and several liability. The effects of this, vis a vis liability insurance, have been dramatic.

Increased litigation, higher out of court settlements and increased damage awards, spurred on by an expanding range of liability in tort, has shaken the insurance industry to its financial roots. "For example, Reed Stenhouse, which arranges insurance for approximately sixty B.C. municipalities, advises that payouts on municipal policies for the year ending December 31, 1984, were 160% of the premiums collected."¹⁷³ As a result, many insurance firms have restricted their municipal policies or stopped them altogether, while other companies simply have gone out of business. The net result is a very "limited market for municipal insurance, increased premiums and higher deductables."¹⁷⁴

For municipalities throughout the country the results have been devastating. In British Columbia, the City of Vancouver, up until November, 1985, paid a \$250,000 premium for \$50 million coverage, including errors and omissions.¹⁷⁵ The deductible was \$50,000, but this dropped down to a \$1,000 deductible if only an individual

employee was named in the suit and the city itself was not joined. The renewal policy would have raised the premium to \$1.6 million, the "drop down" provision with respect to the deductible would have been eliminated and the policy would no longer cover errors and omissions or pollution related claims.

The city viewed these terms as outrageous and refused to accept the offer. Consequently, Vancouver no longer has a private insurance policy. Instead, the city is now self-insured. To date, it has funnelled over \$1 million into a special fund and it hopes to be able to withstand claims totaling up to \$10 million maximum.

The Union of B.C. Municipalities has released figures¹⁷⁶ which demonstrate the dramatic effect the insurance "crisis" has had on smaller local governments. On average, B.C. municipalities have experienced premium increases of between three hundred and one thousand percent. For example, the municipality of Burnaby had a premium increase of seven hundred and eighty-five percent from \$35,614 to \$315,000 while its deductible rose from \$10,000 to \$25,000. Surrey, B.C., saw its annual premium leap from \$31,000 to \$150,000 and its deductible increase nine hundred percent from \$5,000 to \$50,000.

The story is the same in the other provinces.¹⁷⁷ Calgary's insurance coverage plummeted from \$103 million in 1985 to \$20 million in 1986. The city's deductible rose from \$100,000 to \$250,000 per claim and its premium for this reduced coverage shot up from \$400,000 to \$1.6 million.

Regina's renewal policy provided the city with "one fifth the coverage, with twenty-five times the deductible at about twice the

cost."¹⁷⁷ Regina now pays \$285,000 for \$5 million coverage with a \$25,000 deductible. In Manitoba, Winnipeg was forced to settle for an eighty percent drop in coverage when it found itself faced with a premium increase of two hundred and fifty percent.

Metro Toronto found it necessary to set aside \$9.5 million to insure itself due to inadequate coverage offered by private insurance firms. The city's current policy costs \$475,000 in premiums, but the deductible is set at \$5 million, meaning that it must pay all claims up to that amount out of its own coffers.

In Quebec, the lowest bid for insurance for Montreal-Nord, Quebec's fifth largest municipality, was six hundred and seventy-seven percent higher than the previous year. Unable to pay the increased premiums, the municipality was forced to accept a five hundred percent deductible increase and, in the bargain, assume its own risks insofar as civil responsibility is concerned. All this for a price tag of \$418,000, three hundred and seventy-three percent more than in 1985. The Maritime provinces, as might be expected, are no better off.

Who pays for all of this? The taxpayer, of course. In addition to increased municipal taxes, he or she also faces possible reductions in, or wholesale elimination of some services. But what is more, the taxpayer may also soon face the prospect of local governments passing off certain responsibilities in specific areas to the private sector in an effort to avoid liability.

Mr. Terry Bland, senior counsel for the City of Vancouver, advises that Vancouver is seriously looking at, for instance, getting out of the business of building inspections. As a consequence of

decisions such as Anns and Kamloops v Nielsen, the city feels that this is one area of potential liability that it should try to eliminate. What is envisioned is a system wherein responsibility for obtaining building inspections is left with the builder. Architects or engineers would have to be hired privately to provide the inspection certificate. This would be a prerequisite to the acquisition of an occupancy permit. In this manner, liability would fall upon the professionals who actually do the inspection. The problem, however, would not really go away, it would simply no longer be the city's problem.

More accurately though, it is the public that actually bears the costs. Whether it is the municipality's as opposed to the engineers' insurance that is increased, the bill is always ultimately footed by the consumer of the service in question. The same principle applies to all those who employ the expertise of any professional.

But there is another victim as well, and that is the professional himself or herself. For many, the expense of paying soaring premiums for liability insurance is having a serious effect on their ability to remain in business. For others who either simply cannot afford to purchase or who are completely unable to obtain insurance, the prospects are even bleaker. In many cases the grim possibility that a single large damage award could end a career looms large in the future. However, given the current state of liability insurance, that is a risk that many professionals are forced to take.

What are the reasons for this "crisis" in liability insurance? Why the skyrocketing premiums for substantially reduced coverage? Why the exodus of insurers from this market? The answer you get depends on who you ask. According to the insurance industry,¹⁷⁸ there are a variety of interlocking symbiotic factors. Chief among them are: the cyclical nature of the business, fluctuating investment income, the reinsurance market, catastrophe claims, and the market's "reaction to large awards and the gradual erosion of the law of negligence."¹⁷⁹

They point out that foreign reinsurers are presently reeling from the potential financial consequences of such events as the Bhopal, India gas leak, the litigation surrounding the Dalkon Shield, and major airline crashes worldwide. But, more particularly, the reinsurance market has turned "sour on liability insurance in North America due to the risk of massive compensation awards being handed down by the courts."¹⁸⁰ While this perception is founded primarily on their observation of the American legal system, Canada finds itself tarred with the same brush. It is an unfortunate fact that off-shore reinsurers consistently lump Canada together with the U.S. market when determining rates and coverage.

As well, even in Canada, insurance officials point to dwindling profits,¹⁸¹ an ever expanding duty of care and large damage awards as the essential root of the problem. Repeated references are made to the March, 1985 decision of the Supreme Court of Ontario in McErlean v City of Brampton,¹⁸² in which a trail-biker who suffered brain-stem injuries after an accident on municipal property was awarded

almost \$6.8 million. This is cited as an example, albeit extreme, of the sorts of awards that insurers will soon be expected to pay.

"What we are saying is the large awards have affected people's expectations and that, in turn, affects out-of-court settlements."¹⁸³

Critics of the insurance industry dispute this.¹⁸⁴ They argue that the current "crisis" was primarily caused by the industry's own greed and lack of foresight. They point out that in the mid-seventies, when interest rates climbed to unprecedented levels, insurance companies saw the opportunity to earn tremendous profits from investment income. In order to acquire the capital, insurers ignored underwriting losses in a mad dash to obtain policy holders at any price. As a result, many inexperienced companies leapt into the market and this increased competition only served to further accelerate the downward policy premium spiral. But then came the 1980's and boom turned to bust as interest rates plummeted and investment profits dried up, driving the marginal companies out of the market or out of business. Remaining insurers were forced to dramatically increase premiums and reduce coverage in an effort to minimize the losses occasioned by prior "bargain-basement" policies. Today's lean insurance market is, arguably, a direct result of this folly.

But, whatever the true reasons are, the fact remains that liability insurance is currently in a state of "crisis." Each year, professionals face dramatically increased costs for insurance. Each year, the coverage shrinks and the deductibles rise. And each year, more professionals are abandoned by nervous insurers and left to fend for themselves. Clearly, the assumption that all professionals are

protected by the "deep pockets" of insurance must be re-thought in light of the foregoing analysis. If indeed, as Lord Denning stated, the courts do take into consideration the issue of insurance when determining the existence of liability and duty relationships, it is submitted that such a re-evaluation is crucial. The current plight of professionals and, for that matter, the public at large, must play a part in the judicial process when the court turns its mind to consider the justness and reasonableness of the imposition of a duty of care in a particular fact pattern.

III Conclusion: A Happy Ending, Nice and Tidy?

As the foregoing survey of the case law on negligence law vis a vis economic loss shows, many recent decisions, notably those of the House of Lords, have evidenced an increasing reluctance to follow Anns in acknowledging the existence of a prima facie duty of care based only on the notion of reasonable foreseeability. This "trend," if it may be so called, appears to have begun in 1982 with the Victorian Supreme Court in Seale v Perry.¹⁸⁵ In 1984, the High Court of Australia, in Jaensch v Coffey,¹⁸⁶ expressed a similar view and pointed out what, in its view, was "a common, although mistaken, tendency to see the test of reasonable foreseeability as . . . the sole determinant of the existence of a duty of care."¹⁸⁷ The Court called for general limitations or controls on the reasonable foreseeability test as the only criterion for the existence of a prima facie duty relationship in cases involving pure economic loss.¹⁸⁸

In 1984, the House of Lords, in Peabody, responded to this call by imposing a new restriction on the prima facie duty principle. Their Lordships held that when deciding the duty issue, it was incumbent on the court to determine whether or not it would be "just and reasonable" to do so.¹⁸⁹ A duty of care was no longer to be assumed prima facie. This crucial legal question was now to be examined on its own merits.

This new approach to the duty issue was emphasized by the Privy Council in Candlewood.¹⁹⁰ The Law Lords clearly stated that "some limit or control mechanism has to be imposed on the liability of a

wrongdoer."¹⁹¹ Apparently even Junior Books no longer stood in the way. The Privy Council clearly does not now regard that case as establishing the principle that pure economic loss was recoverable in tort on the basis of reasonable foreseeability alone.

Indeed, it is the decision in Peabody, not Anns, which is now cited as the correct statement of the law. In fact, the High Court of Australia in Shire of Sutherland v Heyman expressly stated their preference for Peabody in the course of that decision.¹⁹²

Brennan, J.A. went on to assert that

it is preferable . . . that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care.¹⁹³

Again, in 1986, the House of Lords in Leigh and Sullivan v Aliakmon reiterated their view that Lord Wilberforce's speech in Anns

does not provide, and cannot . . . have been intended . . . to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence.¹⁹⁴

In addition, their Lordships strongly qualified yet another fundamental tenet of the Anns decision. In Anns, Lord Wilberforce had stated:

[T]he position has now been reached that in order to establish that a duty of care arises in a particular decision it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.¹⁹⁵

But the door to litigation which Lord Wilberforce had opened wide with these words was to be effectively shut only eight years later when Lord Brandon of Oakbrook declared that, in his opinion, Lord Wilberforce

was not . . . suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had been repeatedly held not to exist.¹⁹⁶

No longer would the law of negligence be used "to impose liability where there is no good grounds to support a civil obligation."¹⁹⁷

It is submitted that the above-noted cases are the vanguard of a trend in judicial thinking. In the Commonwealth courts, activism has been supplanted by a more restrained approach to negligence liability. The courts have recognized the extent to which the law of negligence has spread and they appear determined to slow its advance, re-examine its underlying elements and principles, and set it on a new, more attenuated course. It is our opinion that this is certain to have a salutary effect on the law, both for those who work within it and for those affected by it.

Although Anns may have given voice to a number of liberal ideals and enabled the desirable goals of victim compensation and loss allocation to be attained, it was, nevertheless, fraught with a number of problems and attended by great uncertainty. The essential element of predictability in the law was difficult to achieve when liability in negligence rested on amorphous and, at times, arbitrary notions of proximity and reasonable foreseeability.

In a very real sense, reasonable foresight often amounts to nothing more than judicial hindsight. The mere appearance in the court of a blameless victim who has suffered economic loss at the hands of an allegedly negligent tort-feasor is often, in itself, strong evidence that a prima facie duty of care should be held to exist. For, as Lord

Atkin in Donoghue v Stevenson put it, is not such a plaintiff "so closely and directly affected by my actions that I ought reasonably to have [him] in my contemplation as being so affected when I am directing my mind to the act or omission?"¹⁹⁸ Considered solely on the basis of reasonable foreseeability, the answer will often be yes.

Once the prima facie duty of care is established, the legal issues are largely settled. Questions as to the standard of care and breach of that standard are questions of fact only and the remoteness of damage issue was in all likelihood subsumed in the duty issue, since both turn on reasonable foresight. And, as was noted above,¹⁹⁹ in Canada negligence actions may be decided by a jury. The judge may no longer be able to deny recovery after the prima facie duty has been held to exist. It is submitted that the law regarding liability in negligence must be put back into the hands and the safe-keeping of the judiciary, where it should be encouraged to develop "incrementally and by analogy with established categories [of negligence law] rather than by a massive extension of a prima facie duty of care."²⁰⁰ In light of the recent "trend" in Commonwealth case law, we submit that there is strong authority for such a conclusion.

The current inclination of the courts, with the anomalous exception of Nicholls v Richmond, to return to the exlusive rule, subject to certain specified exceptions,²⁰¹ lends more force to this argument. It must be remembered that each exception was born out of the courts' experience in wrestling with the existence of the exlusive rule in the face of particular fact-situations. At no stage

did the courts advocate a wholesale abandonment of the rule. Rather, they went to great pains to set out specific criteria that must be met before a negligence action for pure economic loss could be brought within the ambit of one of those exceptions.

In our view, while the exceptions were not only remembered, but allowed to flourish, the criteria upon which they were established were all but forgotten or ignored. The Hedley Byrne exception for negligent misstatements, it should be recalled, was strictly conditional on it being averred and proved that there was an undertaking on the part of the defendant, reliance by the plaintiff and the existence of a "special relationship" "equivalent to contract."²⁰²

The Supreme Court of Canada, in Haig v Bamford included an additional criterion that must exist before liability could be found for negligent misstatement. The court held that the defendant must also have "actual knowledge of the limited class that will use and rely on the statement."²⁰³ It is submitted that the requirement of "actual knowledge" may justifiably be extended to include "constructive knowledge" as well.

The two remaining exceptions to the exclusory rule - unreasonable failure to exercise a duty to warn (Rivtow) and "physical propinquity" (Caltex and Trappa Holdings) - also contain their own set of requirements. For a court to ignore any of those criteria is to, in effect, establish a new exception to the exclusory rule complete with a new complement of standards and tests. We would argue that it was by just such an insidious, though inadvertent, method that the law of

negligence found itself expanding at such an unprecedented rate over the past fifteen years.

We have no wish to suggest that we turn the clocks completely back on the law of negligence. We do not advocate a return to the halcyon days prior to Donoghue v Stevenson or Hedley Byrne. What we do advocate, however, is that courts take note of the House of Lords' call for the imposition of controls on the range of a duty of care and practice restraint when deciding the existence of a duty of care. More importantly, we submit that such a decision, since it is a question of law and not a question of fact, should no longer be assumed prima facie on the basis of reasonable foreseeability. Rather, such a determination should be made on the basis, not only of foreseeability and proximity, but additionally on the basis of its justness and reasonableness and after a careful examination of any policy considerations that may impinge upon it. As well, the criteria that were originally set out when a particular exception to the exclusory rule was established must be specially considered.

In essence, we submit that it is the consequences of imposing a duty of care that must be focussed on and closely examined before any decision is made. As the preceding analysis of the "crisis" in professional liability insurance shows, there are certain assumptions regarding the consequences of a finding of liability vis a vis professionals that no longer bear close scrutiny. This fact should be kept in mind by the courts of this country, lest the long-term costs visited upon the defendants and further down the line - consumers,

taxpayers, and the rest of society, outweigh the immediate benefits enjoyed by the plaintiffs.

The law of negligence no longer requires any additional expansion of its ambit based on vague notions of reasonableness and foreseeability. Rather, what is needed now is restraint, consistency and predictability. The Commonwealth courts have clearly indicated their support for this view and have taken the first important steps in this direction. It is now up to Canadian courts to set a new standard in this country.

FOOTNOTES

1. [1939] 1 K.B. 194 (C.A.)
2. The designation "professionals," for purposes of this paper, will be limited to those whose liability for damages normally sounds in pure economic loss not arising as a result of physical damage to person or property. Consequently the reader should be aware that professionals such as doctors, engineers, architects, and so on are only peripherally the subject of the discussion herein.
3. See for instance, Scott Group v McFarlane (1978) 1NZLR 553 re accountants. See also Wittingham v Crease (1978) 88 DLR (3d) 353 (BCSC) re lawyers.
4. Information provided by Law Society of B.C.'s Director of Insurance and Loss Control - August 1986.
5. [1932] A.C. 562 (H.L.)
6. See Cattle v Stockton Waterworks Co. [1874-80] All E.R. 220; 10 Q.B. 453 and Weller & Co. v Foot & Mouth Disease Research Inst. [1966] 1 Q.B. 569 [1965] 3 All E.R. 560 and contrast with Hedley Byrne v Heller & Partners [1964] AC 465; [1963] 2 All E.R. 575 (H.L.) and Rivtow Marine Ltd. v Washington Iron Works [1974] S.C.R. 1189; 40 D.L.R. (3d) 530
7. [1978] A.C. 728; [1972] 2 All E.R. 492 (H.L.)
8. This insurance "crisis" will be examined in depth in the second part of this paper. At this point it is sufficient to note by way of example that: for B.C. lawyers - the first \$100,000 of liability is not covered by a commercial insurance scheme; in Manitoba - lawyers' are exclusively covered by a self-insurance plan; and in B.C. some cities and municipalities in 1986 were unable or unwilling to get commercial insurance and so are also completely self insured while others faced premium increases of between 300% and 1000%.
9. See footnote 1
10. [1939] 1 K.B. 205 (C.A.)
11. See Robertson v Fleming (1861) 4 Macq. 167 (H.L.)
12. A client also had an action for a breach of a fiduciary duty. This was established in Nocton v Lord Ashburton [1914] A.C. 932; [1914] All E.R. 45 (H.L.).
13. Derry v Peek (1889) 14 App. Cas. 337 @ 374
14. [1932] A.C. 562 (H.L.)
15. [1964] A.C. 465

16. Minister of Environmental Planning v San Sebastian Pty. [1983] 12 N.S.W.L.R. 268
17. Scruttons v Midland Silicones [1962] A.C. 446 at 488 [1962] 1 All E.R. 1 at 19
18. Ibid at p. 580
19. Home Office v Dorset Yacht Co. Ltd. [1970] A.C. 1004 at 1027 (H.L.) per Lord Reid.
20. Supra, note 14, at 568 - Lord Atkin warned about the hazards of stating principles of law too generally, in fear that they would restrict the adaptability of English law
21. Ibid at 584 - Lord Buckmaster was against shattering the confines of privity of contract. He quoted with approval the judgment of Alderson B in Winterbottom v Wright:

"The only safe rule is to confine the right to recover to those who enter into a contract; if we go one step beyond that, there is no reason why we should not go fifty."
22. See Cattle v Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453
23. Partlett, David F. Professional Negligence (1985) at pp.48 & 49
24. [1951] 2 K.B. 164
25. [1964] A.C. 465 at 509
26. Candler, supra, note 24 at p. 179
27. Ibid at pp. 180-181
28. Feldthusan, Economic Negligence at p. 39
29. See Partlett, Professional Negligence at p. 59
30. Donoghue v Stevenson [1932] All E.R. at 30 [1932] A.C. @ 619
31. Hedley Byrne at p. 526, per Lord Devlin.
32. Ibid at p. 482
33. See Feldthusan, Economic Negligence p. 38 and Gordon, "Hedley Byrne v Heller in the House of Lords" (1964-65) 2 U.B.C. L. Rev. 113
34. Hedley Byrne, supra, note 25 at p. 510

35. Ibid at p. 510
36. Ibid at p. 517 - Lord Devlin stated:
- "The interposition of physical injury is said to make a difference of principle. I can find neither logic nor common sense in this ... I am bound to say, my lords, that I think this to be nonsense."
37. Ibid at p. 502
38. Ibid at p. 514
39. Ibid at p. 492
40. Ibid at pp. 528-29
41. Ibid at p. 530
42. Ibid at p. 509
43. Mutual Life & Citizens Assoc. v Evatt [1971] A.C. 793; [1971] All E.R. 150 (JCPC)
44. Mutual Life v Evatt, Ibid, at p. 802

"In Hedley Byrne itself and in the previous English cases on negligence, statements which were analyzed in the speeches, with the notable exceptions of Fish v Kelly (1864) 17 CBNS 194; Derry v Peek (1889) 14 A.C. 337 and Law v Bouverie [1891] 3 Ch 82, the relationship possessed the characteristics (1) that the maker of the statement had made it in the ordinary course of his business or profession and (2) that the subject matter of the statement called for the exercise of some qualification, skill or competence not possessed by the ordinary reasonable man, to which the maker of the statement was sworn by the recipient to lay claim by reason of his engaging in that business or profession."

45. Ibid at p. 807.
46. See for example Shaddock & Ass. Pty. Ltd. v Parramatta City Council [1981-82] 150 CLR 225

per Gibbs, C.J. at p. 234:

"With all due respect I find it difficult to see why, in principle the duty should be limited to persons whose business or profession includes giving the sort of advice or information sought and to persons claiming to have the same skill and competence as those carrying on such a business profession."

per: Murphy J. at 256.

"... it follows that this court is not bound by the privy Council decision in the MLC case and there is no justification for adhering to the error expressed by the Privy Council in that case."

47. Haig v Bamford [1977] 1 SCR 466, 72 DLR (3d) 68
48. Ibid at p. 75 per Dickson, J.
49. Ibid at p. 75.
50. [1974] SCR 1189, 40 DLR (3d) 530
51. (1976) 11 ALR 227, 136 CLR 529
52. Ibid at p. 555
53. Ibid at pp. 592-93 per Mason J.
54. [1978] 6 WWR 545
55. (1931) 255 N.Y. 170; 174 N.E. 441 at p. 444
56. Caltex, Supra, note 51, at p. 552
57. Ibid at p. 551
58. [1983] 4 WWR 169
59. Ibid at pp. 173-174
60. Ibid at p. 174
61. [1977] 2 All ER 492
62. Burns & Smith, "Donoghue v Stevenson, the Not So Golden Anniversary" (1984) 46 Modern Law Review, 147 at p. 154
63. [1970] 2 All E.R. 294, [1970] A.C. 1004 (H.L.)
64. Ibid at p. 1027
65. Ibid at p. 1027
66. Ibid at p. 498
67. Deane, J. in Jaensch v Coffey (1984) 58 ALJR 426 at p. 441 warns that one must "remain conscious of the fact that the terms 'proximity' and 'relationship of proximity' have been used in such judgements to convey a variety of different meanings ..."

68. Ibid at p. 46
69. [1973] 1 Q.B. 27 at p. 37, [1972] 3 All E.R. 557 at p. 567
70. Burns & Smith, supra, note 62 at pp. 161-162
71. [1978] 1 NZLR 553
72. Only Richmond, P. failed to acknowledge the existence of a duty of care. The action failed as the court found no damages recoverable in tort. Ibid at pp. 585-589
73. Ibid at p. 566
74. (1976) 72 DLR (3d) 68
75. Ibid at p. 75
76. Ibid at pp. 573, 574
77. Ibid at p. 583
78. [1980] 146 CLR 40
79. Ibid at p. 47
80. [1980] 1 Ch. 297
81. See also Gartside v Sheffield, Young, & Ellis [1983] Q.B. 409 & Watts v Public Trustee for W. Aust [1980] W.A.R. 97 whose facts and decision are quite similar
82. Ross v Caunters, supra, note 80, at p. 310
83. Ibid at p. 315
84. Ibid at p. 314
85. Megarry, V.C. based this aspect of his decision on Esso Petroleum v Mardon [1976] Q.B. 801, and Midland Bank Trust Co. v Hett, Stubbs & Kemp [1979] Ch. 384
86. Ross v Caunters, supra, note 80 at pp. 322, 332
87. (1980) 105 D.L.R. (3d) 632
88. Ibid at p. 638
89. [1982] Q.B. 438
90. [1981] 3 All E.R. 289

91. Wolfe, J. stated: "the appropriate test for establishing whether a duty of care exists appears in this case to be whether the defendants knew or reasonably should have foreseen at the time ... that a person might rely on those accounts ... and therefore could suffer loss if the accounts were inaccurate."
Ibid at p. 296
92. Tracy v Atkins, Ibid at p. 638
93. [1983] NZLR 37
94. [1983] NZLR 22
95. Ibid at p. 41
96. [1983] 4 WWR 169
97. Ibid at p. 173
98. Partlett, Professional Negligence, at pp. 50-51
99. Burns & Smith, supra, note 62, at pp. 161-162
100. [1982] VR 193
101. Ibid at p. 198
102. [1983] 1 AC 410
103. Ibid at p. 420
104. [1967] 3 All ER 1621
105. Ibid at p. 1623
106. See for example Jaensch v Coffey (1984) 58 ALJR 426 at p. 428 per Gibbs C.J. (High Ct. of Aust.) and Council of the Shire of Sutherland v Heyman (1985) 59 ALJR 564 at p. 570 per Biggs C.J.
107. Seale v Perry, supra, note 100 at p. 203
108. Ibid at p. 215
109. Ibid at p. 200
110. Ibid at p. 211
111. Hedley Byrne, supra. note 25
112. Seale v Perry, supra, note 100 at p. 209
113. [1983] 2 NSWLR 268

114. Ibid at p. 279
115. (1984) 58 ALJR 426
116. Ibid at p. 420
117. Ibid at pp. 440-441
118. Ibid at p. 440
119. (1984) 3 WLR 953
120. See also: Investors in Industry Commercial Properties Ltd. v South Bedfordshire District Council; [1986] 1 All ER 787
121. Supra, note 119 at p. 960
122. See for ex: Ross v Caunters, Ibid at p. 320, per Megarry, V.C.
" ... the standard generally adopted in negligence cases is to impose liability on the general Donoghue v Stevenson basis of reasonable foreseeability."
123. [1985] 2 All ER 935
124. These were: Lord Brandon of Oakbrook and Lord Templeman.
125. Ibid at p. 945
126. (1875) LR 10 QB 453
127. Supra, note 123 at p. 945 per Lord Fraser of Tullybelton:
"Almost any rule will have some exceptions, and the decision in Caltex may be perhaps regarded as one of the 'exceptional cases' ... Certainly the decision in Caltex does not appear to have been based on a rejection of the general rule stated in Cattle's case."
128. [1983] AC 520
129. [1985] 3 WLR 993 at p. 1006
130. [1985] 59 ALJR 564
131. Ibid at p. 570
132. Ibid at p. 580 :
"it is evident from what I have written that I am unable to accept all that Lord Wilberforce said in his speech."
133. Ibid at p. 587:
"Some broader foundation than mere foreseeability must appear before a common law duty to act arises."

134. Ibid at p. 588
135. [1986] 2 All ER 145
136. Ibid at p. 153
137. see for example: Scott Group v McFarlane [1978] 1 NZLR 553
138. see for example: Ross v Caunters [1980] 1 Ch. 297, and Wittingham v Crease (1978) 88 DLR (3d) 353 (BCSC).
139. Partlett, D.F. Professional Negligence (1985) at 369 & 370
140. Denning, M.R. In The Discipline of Law (1979) at 282
141. [1971] 2 Q.B. 245
142. Ibid at p. 256
143. Ibid at p. 253
144. [1983] NZLR 22
145. Ibid at p. 31
146. [1983] NZLR 37 at 51: "Insofar as an action in negligence may be viewed as a loss allocation mechanism, there is much force in the argument that the costs of carelessness ... should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance, rather than be borne by the hapless individual third party."
147. [1982] VR 193
148. Ibid at p. 238
149. [1972] 1 Q.B. 373
150. [1980] AC 827
151. Supra, note 147 at p. 238
152. Denning, M.R. In the Discipline of Law (1979) at p. 282
153. Insurance information regarding B.C. lawyers supplied by the Law Society of B.C.'s Director of Insurance and Loss Control, August 1986.

154. These fees may be adjusted either up or down. Savings of up to \$100 per year may be had if certain specified loss prevention strategies are employed. A surcharge of \$100 is levied for any claim paid in the preceeding five year period and an additional \$650 will be charged for any new claim paid up to a maximum of four.

As well, it should be noted that this average yearly premium does not include any excess liability insurance an individual member or firm may wish to carry.

155. Professional liability insurance is compulsory for laywers in all provinces in Canada except for Quebec.

156. per Graeme Garson, C.E.O. of the Law Society of Manitoba, quoted in Winnipeg Free Press, Mar. 10, 1986 at p. 3. NOTE: many of the facts regarding the Manitoba situation were culled from the above cited news article.

157. Ibid

158. Information re: accountants obtained from Ellen Poole, Accounts Manager with the Association of Chartered Accountants of B.C.

159. See, for example: Haig v Bamford [1977] 1 SCR 466, 72 DLR (3d) 68; Scott Group v McFarlane [1978] 1 NZLR 553; and J.E.B. Fasteners Ltd. v Marks Bloom & Co. [1981] 3 All ER 289

160. I am indebted to Mr. R.B. Sykes, Assistant Vice-President of Taxation and Risk Management for the Bank of B.C., who supplied a great deal of the information used in this portion of the paper.

161. As quoted in Globe and Mail, May 9, 1986, p. B-3

162. Maloney, M.A. "Whither the Statutory Derivative Action?" The Canadian Bar Rev., v 64, no. 2, 309

163. Information obtained from Globe and Mail, May 9, 1986, p. B-3

164. See Vancouver Sun, August 10, 1985, p. C-5

165. Toronto Star, March 7, 1986, p. C-2

166. Toronto Star, March 7, 1986, p. C-2

167. (1969) 4 DLR (3d) 155, 68 WWR 173 (BCCA)

168. (1979) 8 CCLT 179 (BCCA)

169. (1978) 6 WWR 545
170. [1983] 4 WWR 169
171. [1984] 2 SCR 2, [1984] 5 WWR 1
172. For example: Trappa Holdings v Surrey and Nicholls v Richmond
173. From Summary of Presentation to the Insurance Section, B.C. Branch of the Canadian Bar Association, February 17, 1986, at p. 1
174. Ibid at p. 2
175. Information supplied by Mr. Terry Bland, senior counsel for the City of Vancouver (August 1986).
176. Appended to the Summary of Presentation - see footnote #173
177. The following facts and figures taken from Toronto Star, January 19, 1986, p. F-1
178. See for example: the "Monthly Letter" published by Leslie, Wright and Wolfe Group, #198, December 1985
179. Ibid at p. M2/18
180. Edward Belton, president of the Insurers' Advisory Organization of Canada, quoted in the Calgary Herald, January 15, 1986, p. E-2
181. See, for example, footnote 173 above.
 - As well, the Insurers' Advisory Organization predicts that for every \$1. in premiums taken in by insurers this year, \$1.10 will be paid out in claims. Quoted in the Vancouver, Sun, August 10, 1985, p. C-5.
 - The general liability non-marine group of Lloyds of London claims to have lost £314 million in 1982 and states that results have been no better since. Quoted in the New York Times, March 5, 1986, p. D-4
182. (1985) Ont. High Ct. No. 38495/79
This case is currently being appealed on the quantum of damage issue.
183. Catherine McGregor, spokesperson for the Insurance Bureau of Canada, quoted in the Toronto, Star, January 21, 1986, p. A-14

184. See, for example: "The Manufactured Crisis; Liability-Insurance Companies Have Created a Crisis and Dumped it on You." Consumer Reports, August 1986, and "Sorry Your Policy is Canceled," Time, March 24, 1986, 16 at p. 29.
- See also: "Liability Insurance in Crisis," editorial in New York Times, March 4, 1986, p. A-26 and "Loss of Insurance," editorial in The Globe and Mail, January 24, 1986, p. A-6.
185. See discussion, supra, at pp. 22-24
186. See discussion, supra, at pp. 26 & 27
187. (1984) 58 ALJR 426 at p. 440 per Deane, J.
188. Ibid at pp. 440-441
189. See discussion, supra, at pp. 28-29
190. See discussion, supra, at pp. 29-30
191. [1985] 2 All ER 935 at p. 945
192. [1985] 59 ALJR 564 at p. 570 per Gibbs, C.J.
193. Ibid at p. 588
194. [1986] 2 All ER 145 at p. 153 per Lord Brandon of Oakbrook
195. [1977] 2 All ER 492 at p. 498
196. Ibid at p. 153
197. Burns & Smith, supra, note 62, at p. 163
198. [1932] AC 562 at p. 580
199. See discussion, supra, at pp. 32-33
200. Aliakmon, supra, note 135, at p. 570
201. These are: Hedley Byrne - negligent misstatement, Rivtow Marine - failure of a duty to warn, and Caltex and Trappa Holdings - physical propinquity. See discussion, supra, at pp. 11-13.
202. [1964] AC 465 at p. 529
203. [1977] 1 SCR 466, 72 DLR (3d) 68 at p. 75