A LAWYER'S LIABILITY FOR NEGLIGENCE

- CARE IS NOT ENOUGH

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I. INTRODUCTION

With increasing frequency lawyers are being found liable for professional negligence. An analysis of recent caselaw discloses two reasons for this disturbing trend:

i) the variety of circumstances in which a lawyer is found liable, and the range of persons to whom he or she owes a duty, has been greatly expanded in recent years by the courts;

ii) the definition of negligence has been changed by the courts; the "ordinary, prudent solicitor" test has been superceded by a test, based on public policy considerations, of avoiding foreseeable risk.

Several brief quotations may serve to highlight these judicial trends:

- in The Discipline of Law, 1979, Lord Denning wrote at p.282:

> 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 taxpayer - all of whom are assumed to have limitless funds. In theory the Courts do not look behind the masks. 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 awards 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 any one singly, it should be borne, not by him alone, but be spread throughout the community at large. Nevertheless, the moral element does come in. The sufferer will not recover any damages from anyone except when it is that person's fault. It is only by retaining that moral element that society can be kept solvent. To award compensation without fault would make society bankrupt. No one could pay the premium needed to get cover. 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.

- in Allied Finance and Investments Ltd. v. Haddon & Co. [1983] NZLR 22, Richardson J. stated:

> ... 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. (p.31)

- in Edward Wong Finance Co. Ltd. v. Johnson Stokes & Master (A Firm) [1984] 2 WLR 1 (P.C.) the Court found the solicitor Leung

liable in negligence for breach of contract, and awarded damages of $1,295,000 (H.K.), but stated:

> Their Lordships wish to add that they do not themselves attach blame to Miss Leung for the calamity that occurred. In entrusting the vendors' solicitor Mr. Danny Yiu with the whole of the money she was merely following the normal practice of her firm, and she had never been instructed to act otherwise in such a case or to take any special precautions. (p.10)

To find negligence without attaching blame may appear incongruous. But this is the modern basis of fixing liability, and to understand how we have arrived at this surprising state of affairs it is necessary to review the caselaw which has developed since the early days of this century.

II. THE COMMON LAW

The relationship between a solicitor and his client is established by the retainer. Cordery on Solicitors defines a retainer as a contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations.

One of those obligations which is a universally implied term of every retainer is to exercise due care, skill and judgment in the delivery of legal advice and legal services.

With the exception of an isolated "error of judgment", a lawyer who breaches this duty of care is negligent, and by acting negligently breaches a term of the contract with his client, and is consequently liable in damages.

At common law a lawyer who breached this duty of care was only liable for breach of contract. While the pleadings might have alleged negligence, the claim was in effect a claim for damages for breach of contract.

A leading case was Groom v. Crocker [1939] 1 KB 194 (C.A.):

> In my opinion the cause of action is in contract and not in tort ... . The relationship of solicitor and client is a contractual one ... . It was by virtue of that relationship that the duty arose, and it had no existence apart from that relationship. (p.205)

Two important consequences flowed from this characterization:

i) the relatively strict limitation period relating to breach of contract applied, leading in some cases to the dismissal of claims which would have been valid had they been brought in tort;

ii) only the client had a cause of action against the lawyer, based on the principle of privity of contract.

III. THE FIDUCIARY RELATIONSHIP

But the common law did not always do justice, and the first decisive step in expanding a lawyer's liability was taken in Nocton v. Ashburton [1914] AC 932 (H.L.). Nocton was a solicitor and Lord Ashburton was his long-standing client. Nocton encouraged Lord Ashburton to grant a mortgage over property which Nocton and his partner were selling. Later, Nocton induced Ashburton to release a part of the mortgage security. The effect of that release was to enhance Nocton's financial position and seriously to weaken Lord Ashburton's security.

Lord Ashburton sued Nocton for fraud. The House of Lords ruled that fraud had not been established, and that a claim for breach of contract would have been out of time. However the Court did find in Lord Ashburton's favour, by drawing upon the old bill in Chancery to enforce compensation for breach of a fiduciary obligation.

Lord Dunedin stated:

> But from the other point of view he may have put himself in a fiduciary position, and that fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client. He fails to do so. Equity will give a remedy to the client. (p.964-5)

As a result of Nocton, lawyers have been exposed to a whole new area of liability. In addition to the traditional claim of breach of contract, they may now be sued for breach of fiduciary duty.

IV. EXPANDING THE SCOPE OF THE DUTY OF CARE

A. The Relationship of Proximity

The next step in the march of expanding liability for negligence occurred in 1928 when a Scottish shop assistant drank a bottle of ginger-beer, only to discover part way through that it contained a decomposed snail. Not surprisingly she suffered shock and severe gastroenteritis. She sued the manufacturer for damages for negligence, and had to show that she was injured by the breach of a duty owed to her in the circumstances by the manufacturer to take reasonable care to avoid such injury.

The defendant manufacturer had precedent in his favour. He had sold the ginger-beer to the distributor who in turn sold it to the plaintiff; there was no privity of contract between himself and the plaintiff, hence no duty of care, and hence no liability.

The defendant very nearly won, but by a 3:2 decision the House of Lords struck a blow for the consumer: Donoghue v. Stevenson [1932] AC 562.

Lord Atkin posed the question as follows:

> The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. (p.578-9)

That question called for an analysis of the types of relationships which should give rise to a duty of care. Lord Atkin answered it this way:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. 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 act that I ought reasonably to have them in contemplation as being so affected when I am directing my

> mind to the acts or omissions which are called into question. (p.580)

A snail in a bottle of ginger-beer seems a far cry from lawyer negligence but Donoghue v. Stevenson, by shattering the privity of contract barrier and establishing the new notion of a "relationship of proximity", paved the way for a significant broadening of liability for professional negligence.

B. Reliance on Special Skill or Knowledge

The next step came with Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 (H.L.). Hedley Byrne & Co. Ltd. were advertising agents who acted for Easipower Ltd. They were retained by Easipower to place an extensive advertising campaign whereby they (Hedley Byrne) would become personally liable for the payment of up to £100,000 on behalf of their client.

Hedley Byrne asked their bankers (Bank A) to advise them of the creditworthiness of Easipower. Bank A wrote to Heller & Partners Ltd. who were Easipower's bankers, asking for their confidential opinion as to the respectability and standing of Easipower. Heller & Partners responded to Bank A that Easipower were respectably constituted, and were considered good for ordinary business engagements. Their report was stated to be "for private use and without responsibility".

Bank A conveyed this opinion to Hedley Byrne, who relied on it. Easipower went into liquidation and Hedley Byrne suffered a loss of about £17,000. Hedley Byrne sued Heller & Partners for negligent advice and for breach of their duty to exercise care.

The action failed because of the express disclaimer of responsibility; in the circumstances no duty of care was implied.

But the decision is pivotal for the general statement it makes respecting the duty of care to third parties. The headnote states:

> A negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.

Lord Reid referred to Nocton v. Ashburton and Donoghue v. Stevenson, and then stated:

> Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognized by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. (p.486)

C. The New Test of Neighbourliness

In Anns et al v. Merton London Borough Council [1978] AC 728, the House of Lords brought together the Donoghue v. Stevenson principle of "proximity" with the Hedley Byrne principle of "special skill or knowledge".

In 1962 seven townhouses were built. The local authority, which had a statutory duty to inspect the construction, granted a permit. The townhouses were leased, and some leases were assigned. In 1970 structural movements began, leading to cracks in the walls and a sloping of the floors. The problems were traced to inadequate foundations, and the sub-lessees sued the local authority for failure to inspect or for negligently approving the inspection of the foundations. Since there was no privity of contract between the local authority and the sub-lessees, the case raised the extent to which a duty of care arises outside of a contractual or fiduciary relationship.

The House of Lords found in favour of the sub-lessees. Lord Wilberforce summarized the "new test" as follows:

> Through the trilogy of cases in this House - Donoghue v. Stevenson [1932] AC 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465, and Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004, 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 a 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. (p.751-2)

D. Applying the Expanded Duty of Care Test to Lawyers' Negligence

It was just a matter of time until these broadly worded principles of liability would be applied to lawyers. In this section the cases will be discussed chronologically, as some tend to build on the decisions immediately preceding.

1. Whittingham v. Crease & Co. (1978) 88 DLR (3d) 353 (B.C.S.C.)

C was a solicitor with the law firm Crease & Company. He had acted for the testator W, and went to W's home to have W execute his will. The will left most of the substantial estate to the plaintiff Whittingham.

C, in the presence of Whittingham and his wife, had W execute the will. C witnessed the will and then had Mrs. Whittingham act as the second witness. After the testator died it was discovered that Mrs. Whittingham had witnessed the will. By s.12(1) of the Wills Act the bequest to Whittingham was void because his wife had acted as witness.

Although no solicitor-client relationship existed between Whittingham and the solicitor C, he sued the firm for negligence, for breach of a duty of care, and he won.

The Court observed that in supervising the execution and witnessing of the testator's will, C undertook the responsibility, as an expert in such matters, of seeing to it that the will was correctly signed and witnessed so as to be an effective document, and clearly the testator and Mr. and Mrs. Whittingham understood C to be assuming this responsibility. C's request that Mrs. Whittingham witness the will must be taken as an implicit representation by C to those present that her so doing would result in the testator's will being effective. C was negligent in making the request, and the loss suffered by Whittingham was reasonably foreseeable.

The Court cited Hedley Byrne v. Heller, and the Supreme Court of Canada's decision which followed it: Haig v. Bamford et al (1976) 72 DLR (3d) 68, and went on:

> Mr. C undertook the responsibility of seeing to it that the will was executed and witnessed so that it would be effective in all its terms. It will be recalled that the phrase "undertaking of responsibility" appears in the passage from the judgment of Dickson, J. [in Haig v. Bamford]. The plaintiff was present and, as I have pointed out, had an interest in the proper completion of the will; he, in my view, relied on Mr. C to see to it that the will was properly witnessed. This reliance did not stem from a contractual relationship. It stemmed from what may best be described as the practical realities of the situation. Viewed practically, the conclusion in my view is inescapable that the plaintiff, keenly interested in the will being effective, relied on the solicitor to see to it that it was. He relied on the implied representation to which I have referred. (p.372)

Finding that the factual situation here fell fairly within the principles enunciated in Hedley Byrne, the Court held that in all the circumstances C was subject to an implied duty to Mr. Whittingham to use reasonable care, skill and diligence in attending to the witnessing of the will.

Similar decisions have been reached in other "intended beneficiary" cases: Ross v. Caunters [1980] Ch.279, Watts v. Public Trustee for Western Australia [1980] WAR 97, and Gartside v. Sheffield [1983] NZLR 37 (N.Z.C.A.).

2. Tracy et al v. Atkins (1979) 105 DLR (3d) 632 (B.C.C.A.)

Atkins was a solicitor acting for the purchaser of a home. The purchase price of $50,000 was made up of a down payment of $7,500 and a first mortgage back to the vendor Tracy of $42,500. The purchaser instructed Atkins to prepare the mortgage, deed and Statement of Adjustments. Tracy was not represented by a lawyer.

The purchaser brought to Atkins a letter purportedly signed by Tracy confirming that he was agreeing to an extension of time for completion, and "instructing" Atkins to register his (Tracy's) mortgage as a second charge, giving priority to a $40,000 mortgage which the purchaser was to place on the property.

The purchaser told Atkins that the vendors had agreed with him that he (the purchaser) should get the proceeds of the new mortgage, to enable him to make renovations.

Atkins made no effort to contact the vendor Tracy, and later registered the deed and mortgages. He paid out the purchaser and sent $4,000 to the vendor. The letter purportedly from the vendor was a forgery and the purchaser absconded with the proceeds from the new mortgage.

The property, worth $50,000, was now mortgaged to $82,500. Tracy had lost title, had received only $4,000, and had a substantially useless second charge on the property. With the fraudulent purchaser gone, Tracy sued Atkins for breach of contractual duties and breach of fiduciary duties.

The Court found it unnecessary to decide whether an express or implied retainer existed between Tracy and Atkins. Rather, it found for Tracy on two bases:

a) <u>proximity</u>:

On this issue the Court stated:

> Not in every case will a solicitor be in a relationship of such proximity with an opposing party as was the case here. In the circumstances of this case the solicitor undertook to carry out all the conveyancing including work that would ordinarily be done by the vendors' solicitors, such as registration of the mortgage back. By undertaking to do so he placed himself in the position of dealing with the plaintiffs' interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests. In the circumstances of this case he placed himself in "a sufficient relationship of proximity" that he incurred a duty of care towards the plaintiffs. (p.636)

It is important to note that the Court identified at least 6 warning signals which should have alerted Atkins to the possibility of harm accruing to Tracy, including the fact that the same purchaser had tried once before, via Atkins, to effect the

same sort of priority arrangement on property already mortgaged to the limit.

b) special skill or knowledge

The Court cited Hedley Byrne and Whittingham, and concluded that Atkins should have known that Tracy was relying on him to carry out the conveyance and to protect his interests:

> 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. It is a particular form of the "neighbour" principle dealt with above. (p.638)

The purchaser in this case was a man named J.M. Littleton. This was not the only case in which his priority mortgage scam succeeded; other solicitors found themselves in similar trouble to Atkins in Palmeri v. Littleton [1979] 4 WWR 577 (B.C.S.C.).

A similar scam, although with different characters, took place in Clarence Construction Ltd. v. Lavallee (1980) 111 DLR (3d) 582 (B.C.S.C.); appeal dismissed [1982] 2 WWR 760 (B.C.C.A.).

3. Marko v. P and R (Two Solicitors) (1979) 18 BCLR 263 (B.C. Co. Ct.)

Marko had a claim against D Co., in which solicitor P acted for Marko and solicitor R acted for the company. The settlement provided that Marko would get a $4,000 second mortgage against the company property, and registration of the mortgage was left to R. It was also agreed that the company would get an IDB first mortgage in the amount of $30,000.

R twice tried to register the second mortgage, but twice had to withdraw it because IDB insisted that its first mortgage funds actually be advanced before the second mortgage was registered. In fact R never registered the second mortgage, but failed to advise P or Marko.

D Co.'s property went into default, and it was sold by a judicially approved sale. Marko was not notified of these proceedings because his second charge had not been registered. Marko sued both P and R, and the Court found each solicitor equally liable.

With respect to R's liability the Court said:

> The general concepts of negligence have been held applicable to the solicitor who has undertaken registration, notwithstanding that his retainer is from the other party. (p.267)

The Court cited Tracy v. Atkins and Hedley Byrne, and then concluded:

> It seems immaterial to me whether the assumption of that duty is by words or acts, so long as the person undertaking that duty has indicated that assumption. The assumption of that duty then persists until it is either specifically relinquished before damage or the victim has relieved the obligator of it.
>
> In the case at bar the duty to register was assumed by R. He was aware that the plaintiff, or at least the plaintiff through his solicitor, was relying upon the due execution of that duty. In failing then to fulfil it, he was negligent. (p.268)

The concept that a solicitor may be found liable in negligence to an opposing client who is himself represented by counsel may seem novel, but Marko is not an isolated example. In Allied Finance and Investments Ltd. v. Haddow & Co. [1983] NZLR 22 the New Zealand Court of Appeal found liability in similar circumstances:

> It has long been held that a solicitor owes no duty to a person other than his own client. Where parties to a transaction are represented by their own solicitors a relationship of proximity or neighbourhood such as to import a duty of care from one solicitor to a client of another will rarely arise. In such cases the duty of a solicitor will be to his client alone ... .
>
> But where a special reliance is placed on the solicitor by a client of another there seems no reason why a liability in tort should not arise. But before the proximity relationship is established to make the solicitor liable there must be some degree of reliance established. The concept of proximity must always involve, at least in most cases, some degree of reliance. (p.34-5)

However, in a recent B.C. case the Court found that no such reliance had been established: Dusik v. Newton et al (1985) 62 BCLR 1 (B.C.C.A.), at p.41.

4. Dorndorf et al v. Hoeter (1981) 29 BCLR 71 (B.C.S.C.)

Hoeter was a notary public who had acted in various legal matters for the vendors for 5 years. The vendors owned a large tract of land near Williams Lake which they intended to subdivide. Hoeter

had assisted the vendors in their purchase of this property, and he held a 10% interest which was secured by a $4,500 mortgage registered in Mrs. Hoeter's name.

The Dorndorfs came from Germany and in 1971 agreed with the vendors to buy a 10-acre portion of the land for $2,400. They paid the vendor $700 cash and, at the vendors' instruction, completed a cheque for the balance payable to Hoeter in trust. Both parties sent the cheque to Hoeter with their joint letter advising him that the vendor was selling 10 acres to the Dorndorfs.

The Dorndorfs thought it was reasonable for them to rely on Hoeter to look after their interests, because the vendors had told them that Hoeter was a lawyer and that he would do so. The Dorndorfs knew nothing of the Hoeters' 1/10th interest.

The Dorndorfs began construction of their home before the tract was officially subdivided, and as it turned out the subdivision was never effected. They successfully sued Hoeter for negligence.

The Court found that the Dorndorfs believed Hoeter to be a lawyer, and they relied on his status as a professional adviser in expecting him to protect their interests even though they knew that he was acting for the vendors. Considerable weight was attached to the letter and cheque sent to Hoeter, which the Court concluded should have alerted Hoeter to that reliance.

Hoeter was not in fact an independent professional advisor, and it was not in his personal interest to ensure that the Dorndorfs obtained a temporary security pending the subdivision of the property. In the circumstances Hoeter knew that the Dorndorfs would probably be relying on him, and he had a duty to ensure that they were not allowed to continue in the belief that he would look after their interests.

The Court cited Tracy v. Atkins, Whittingham, Ross v. Caunters, and Palerni v. Littleton and concluded:

> These authorities lead me to the conclusion that the defendant in the present case had a duty of care arising out of awareness of the probability of such reliance. (p.81)

5. Panko v. Simmonds et al [1983] 3 WWR 158 (B.C.S.C.)

The defendant solicitor received instructions from the plaintiff's son-in-law to prepare a transfer of her property in favour of himself and his wife. Although the property was valued at $160,000 no money was to change hands. When the plaintiff attended at the solicitor's office to sign the transfer the solicitor did not explain the significance of the document nor did he ask the plaintiff any questions. The plaintiff, who was an elderly, unschooled and unsophisticated widow, was aware that she was signing a transfer of the property to her daughter and son-in-law, but believed that she was merely helping them to arrange for a small loan. Following the transfer, the daughter and son-in-law mortgaged the property for $100,000 without the plaintiff's knowledge. Subsequently, foreclosure proceedings were commenced and an order nisi was obtained. The plaintiff brought an action against the solicitor for negligence.

The Court found for the plaintiff, citing extensively from Tracy v. Atkins. It identified 4 "warning lights" which should have flashed in the defendant's mind and then stated:

> The solicitor ... should have immediately been alerted to the possibility that the plaintiff was either about to do something that was foolish and contrary to her

> best interests or that she was being defrauded by an unscrupulous daughter and son-in-law ... .
>
> The solicitor undertook the responsibility of effecting the conveyance and he should have known that the plaintiff was relying on him to protect her interest. He failed to recognize the obvious danger signals. He failed to follow the ruling of the Law Society as to the responsibilities of a solicitor in a transaction such as this. He breached his duty to the plaintiff and liability must follow. (p.166-7)

6. Klingspon v. Ramsay et al July 9, 1985 (B.C.S.C.), Vanc. Reg. No. C821075.

The plaintiff K answered an advertisement for a "working partner" in a recreational venture, and was led by one of the promoters of the golf course to believe that if she put her savings into the company she would get a job selling memberships.

She was referred to the solicitor R, a member of the law firm which represented the company. She deposited $40,000 with R; her investment was not secured. Before receiving her share certificate, her receipt and a promissory note for $40,000, R required K to sign a receipt stating:

> I HEREBY confirm and agree that with regard to the purchase of these shares Messrs. Ramsay and Smith are acting as solicitors for the company only and have not offered me any advice other than as to the good standing of the Company and its capacity to issue the within shares, nor have I requested such advice. I am

aware that any such advice should be sought from independent counsel.

Unknown to K, the company was in substantial default under two agreements for sale on the land in question. The land was ultimately lost and the company was left with nothing.

The Court accepted K's evidence that she was troubled about the wisdom of this investment, and when she went to R's office she sought advice and hoped to get some assurances from the company's lawyers as to the financial status of the company. The Court added:

> I accept that Miss Klingspon asked some questions about the company and that the solicitor responded in the way that a person would respond who wished to avoid expressing any opinion of a project and yet not to appear to have any doubts. Having agreed to act for his client in closing the transaction, he was, as a result of his knowledge, in a difficult position. He must have known Miss Klingspon was seeking reassurance and that the investment she was about to make was most unwise. I find that he responded with remarks of a general sort intended not to dissuade Miss Klingspon, but gave no specific assurances ... .
>
> A reading of the receipt would not correct, but would be likely rather to confirm, any false impressions in the mind of such a person as Miss Klingspon concerning the company's financial standing. It is an unfortunately worded document and I think it foreseeable that a person such as the plaintiff, after having a non-specific but reassuring conversation with

> the solicitor, would draw further reassurance - rather than any effective warning - from a reading of the receipt. (p.5, 6)

The Court concluded that in the circumstances the solicitor R had a duty to impress upon K by plain unambiguous words that he could give no assurance concerning the solvency of the undertaking or the security of the investment. The Court found that R was in breach of a duty of care which arose in this particular case from his knowledge of K's reliance and of the very real likelihood she would suffer serious loss, and assigned 25% fault to the solicitor.

An opposite conclusion was reached in Kwak v. Odishaw [1985] 2 WWR 222 (B.C.C.A.), where the defendant solicitor told the plaintiff that he ought to take the promissory note to his own lawyer and review it with him before signing it. The plaintiff did not, and subsequently sued the defendant for breach of a duty to advise him of his contractual obligations.

In dismissing the claim, the Court, per Esson J.A. stated:

> I do not think it is necessary to decide whether the circumstances of this case were such that the lawyer was bound to advise Mr. Kwak to take the note to his own lawyer. It was a prudent and proper thing to do in these circumstances. It was, in my view, certainly all that he had to do. (p.229)

V. IMPOSING A HIGHER STANDARD OF CARE

A. The Traditional Test

In Simmons v. Pennington & Son (A Firm) [1955] 1 All ER 240 (C.A.), Lord Denning summarized the generally-accepted view of the standard of care imposed upon a solicitor:

> The solicitors acted in accordance with the general practice of conveyancers. No ill consequences had ever been known to flow from an answer in this form. Now that the case has gone adversely to the plaintiff, we can see that it was a mistake, but it is so easy to be wise after the event. One has to try to put oneself in the position of the solicitors at the time and see whether they failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor. It seems to me, applying that test, that it is impossible to say that these solicitors were guilty of a breach of duty to their client. It was one of those misadventures and misfortunes which do sometimes happen even in the best-conducted businesses. (p.243)

The "ordinary prudent solicitor" test, its origins and rationale, are discussed in considerable detail in a very recent article: "Lawyers - Negligence - Standard of Care", by Prof. R.M. Mahoney of the University of Otago Faculty of Law, in (1985) 63 Can. Bar Rev. 221.

In the last year that test has been severely threatened by several recent decisions arising in Ontario and Hong Kong respectively. They purport to establish new tests of liability, one based on the implied terms of the retainer, and the other based on the avoidance of a foreseeable risk.

B. The Implied Terms of a Retainer

The decision is Polischuk et al v. Hagarty (1983) 42 OR (2d) 417, appeal allowed (1984) 49 OR (2d) 71 (Ont. C.A.).

The solicitor Hagarty was retained by the purchaser Polischuk to close a transaction of purchase and sale of residential property. There was an existing mortgage to be discharged, and Polischuk was arranging a new mortgage which was to be registered as a first charge.

The vendor was represented by a solicitor named Mitches. Hagarty had dealt with Mitches for 20 years, and they had exchanged undertakings many times. In this case Hagarty gave his undertaking to Mitches to deliver the total purchase funds, and Mitches gave his undertaking to Hagarty to deliver clear title and to use the funds provided by the purchaser to obtain a discharge of the mortgage.

At closing, Mitches had not obtained a discharge, and Hagarty accepted Mitches' undertaking to "obtain and register a good and valid discharge" of the mortgage after registration of the deed. Mitches did not in fact register the discharge; he misappropriated the funds forwarded to him in trust by Hagarty, and soon thereafter died.

Polischuk sued Hagarty for breach of contract in failing to provide him with a good and marketable title to the subject property, free from all prior mortgages and encumbrances, and he succeeded.

The Court found that Polischuk retained Hagarty to effect the conveyance and obtain clear title, and that he gave Hagarty no specific instructions as to how to go about closing the transaction. Polischuk had no knowledge of the normal practice of solicitors to rely on undertakings and neither instructed Hagarty to close the transaction in this way nor agreed to it as an authorized departure from the terms of the agreement of purchase and sale.

Hagarty conceded that he waived the provision respecting the discharge of the mortgage by accepting Mitches' undertaking without consulting Polischuk as to whether he was prepared to waive it:

> Accepting that the defendant solicitor acted on the closing of the transaction in accordance with the general practice of ordinary competent solicitors, that does not end the matter. He was retained to carry out the terms of the clients' agreement of purchase and sale and not to substitute other terms for it. In my opinion, there is no principle of law or professional dealing that justified him in failing to enforce the contract, as written by his clients, unless he received instructions to do so, or the matter was clearly left to his discretion, after he had given advice on it. (p.425)

The Court recognized that in accepting the undertaking from Mitches and paying the balance due on closing to him, Hagarty acted in accordance with the general practice of the profession at that time. It observed that several months after this transaction the Middlesex Law Association recommended that solicitors change their practice and obtain from the vendor a direction authorizing the purchser to make the amount required to discharge the mortgage payable to the mortgagee rather than the vendor's solicitor. Further, the Law Society of Upper Canada's Practice Advisory Service published, two years later, a brochure setting out the background, risks and recommended procedures to be adopted as guidelines.

But even at the time of this transaction it was known generally by prudent solicitors that there was an inherent risk in accepting this type of undertaking. Hagarty, as a prudent and experienced solicitor knew of the risk, even though it was minimal. He knew of alternate methods of minimizing the risk by the devices of "holdback" and "escrow".

By accepting Mitches' undertaking without instructions to do so, Hagarty breached the terms of his retainer whereby he had promised to complete the contract of purchase and sale. It was foreseeable that if Mitches' undertaking was not implemented damages might be suffered by Polischuk, and Hagarty was consequently liable.

C. Avoiding a Foreseeable Risk

The decision is Edward Wong Finance Co. Ltd. v. Johnson Stokes and Master (A Firm) [1984] 2 WLR 1 (P.C.). Edward Wong Finance agreed to lend $1,355,000 to enable a company to purchase the ground floor of a factory building. The loan was to be secured by a mortgage and by the personal guarantees of the company's directors.

Edward Wong Finance instructed Miss Leung of the Johnson Stokes and Master law firm to act for them in the mortgage transaction. Numerous intermediate assignments were necessary, including the discharge of an existing mortgage. In Hong Kong the customary practice was for the purchaser's solicitor to forward the purchase price to the vendor's solicitor on the latter's undertaking to forward duly executed documents.

Miss Leung did so in this case, but the vendor's solicitor absconded with the proceeds without providing clear title. With the existing mortgage not being discharged, Edward Wong Finance did not get the priority they were entitled to, and they sued their solicitors for negligence in not exercising due care, skill and judgment in the performance of their duty to take reasonable steps to protect their interests.

Expert evidence led at trial established that virtually all conveyancing transactions in Hong Kong were done on the strength of undertakings, and that in this case Miss Leung had followed the normal

practice. At the same time there was evidence that this procedure was inherently risky. In 1965 the Law Society of Hong Kong had received a report stating that the practice of relying on undertakings is one of courtesy and convenience only, and that lawyers should realize that they may leave themselves open to claims if a completion miscarries.

The report did not suggest that solicitors should cease to accept undertakings, but made 2 practice suggestions:

a) if any solicitor is concerned about completion and wishes to adopt the English procedure of delivery at closing, then it is unethical for any other solicitor concerned to object or refuse to comply with such request;

b) use of undertakings is a practice of courtesy and convenience only, and any solicitor may properly require in any case that the completion be effected by delivery of title deeds and the executed document only against cash, a banker's draft or certified cheque.

In finding for Edward Wong Finance, the Privy Council posed three questions which it answered in the affirmative:

a) does the practice, as operated by the law firm in this case, involve a foreseeable risk? It did, even though "this was the first occasion on which the use of the Hong Kong style had ever resulted in loss to a purchaser, by reason of the dishonesty of a solicitor acting for the vendor" (p.6). The 1965 Law Society report and the testimony of expert witnesses also confirmed that this procedure entailed risk.

b) could the risk have been avoided? It could have been, without in any way jeopardizing the undertakings system, by:

i) ensuring that the vendor's solicitor has authority from the vendor to receive the purchase monies;

ii) paying the amount required to discharge the mortgage directly to the mortgagee (as advocated by the Law Society of Hong Kong in 1981).

c) was the law firm negligent in failing to take avoiding action? It was, since the risk inherent in the Hong Kong style of completion was foreseeable and avoidable. However the Court then went on to distinguish "negligence" from "blame":

> Their Lordships wish to add that they do not themselves attach blame to Miss Leung for the calamity that occurred. In entrusting the vendors' solicitor, Mr. Danny Yiu, with the whole of the money she was merely following the normal practice of her firm, and she had never been instructed to act otherwise in such a case or to take any special precautions. (p.10)

The Edward Wong Finance decision was recently applied by the Ontario Court of Appeal in Glivar v. Noble et al (1985) 8 Ont. App. Cases 60. In that case the defendant solicitor was found liable for following the prevailing practice of appealing a cleint's property tax assessment to the Assessment Review Court, rather than to the Ontario Supreme Court. He recognized at the time that applications under the former procedure would not always be entertained.

The Court cited Edward Wong Finance for the proposition that:

> If the risk of harm from following prevailing practice is both foreseeable and readily avoidable, a solicitor is negligent in following that practice. (p.66)

D. The British Columbia Situation

The Polischuk and Edward Wong Finance decisions have been placed before the B.C. Supreme Court in a case which is set for trial on March 11, 1986: Bancorp Financial Limited and First Pacific Credit Union v. Ladner, Downs, Vanc. Reg. C844772.

The plaintiffs allege that they retained the defendant law firm to draw and register a mortgage which they had granted to Park Meadow Estates Limited for construction in Kamloops, and to handle progress advances under the mortgage.

When the borrower applied for the initial advance the plaintiffs forwarded $276,000 to the defendants, and they allege that they specifically instructed the defendants to pay $83,000 from those funds directly to the City of Kamloops so as to obtain a building permit. The defendants paid the entire advance of $276,000 to Charles Cowan, the borrower's solicitor, presumably on Cowan's undertaking to pay the $83,000 to the City of Kamloops. Cowan, who has subsequently been suspended by the Law Society, did not pay the $83,000 to the City of Kamloops, and no building permit has been issued.

Construction on the project has stopped, the borrower has defaulted on the mortgage, and the plaintiffs have commenced foreclosure proceedings.

The plaintiffs are suing the law firm for damages:

a) for breach of contract in failing to carry out the plaintiff's explicit instructions, and alternatively

b) for negligence in the handling of the initial advance under the mortgage, by

i) failing to pay the $83,000 directly to the City of Kamloops; and

ii) relying on Cowan's undertaking in circumstances where the defendant knew or should have known that the undertaking should not have been relied upon.

The defendant law firm claims that they paid out the full amount of the advance to Cowan pursuant to the written order to pay executed by the borrower, and they specifically deny that they acted contrary to their clients' instructions or that they were guilty of negligence.

If the Court finds that there was an explicit instruction by the plaintiffs to the defendant to pay the $83,000 directly to the City of Kamloops, the case will not raise new issues of law. But if no such instructions are established, the Court will have placed squarely before it the "breach of an implied term of the retainer" argument which was successful in Polischuk, and the "avoidance of a foreseeable risk" argument which succeeded in Edward Wong Finance.

VI. CONCLUSION

I have attempted to trace the development of the concept of lawyers' liability for professional negligence from the "privity of contract" era to the present.

It is abundantly clear that the net of liability has expanded dramatically in the last seven years, since Whittingham and Tracy v. Atkins applied the English trilogy to B.C. lawyers.

We are now at the stage where a lawyer may be found liable to an intended beneficiary under a will, to an unrepresented vendor or

purchaser in a conveyance, to a party who was independently represented and even to an investor who read and signed a document which advocated independent legal advice. Liability which was at one time dependent on a retainer, may now be found where there is a relationship of proximity, neighbourhood or reliance.

In other words, the last decade has seen a dramatic expansion of the circumstances in which a lawyer will be found liable, and in the range of persons to whom he or she owes a duty of care.

Of greater concern is the possibility that the standard of care is being raised enormously. The "ordinary prudent solicitor" test has given way to a new test of avoiding foreseeable risks, where the Courts will find negligence without attaching blame.

It seems like the ordinary prudent solicitor just got run over by the Clapham omnibus.

It is becoming increasingly clear that, as stated by the New Zealand Court of Appeal, the action in negligence has become a loss allocation mechanism. Lord Denning sensed this shift when he said:

> That is the reason the awards 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 any one singly, it should be borne, not by him alone, but be spread throughout the community at large ... . 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.