CIAJ Conference, Vancouver
October, 1986

NOTES FOR DEBATE ON THE QUESTION: HAVE THE COURTS GONE TOO FAR IN ATTACHING LIABILITY TO LAWYERS?

For the Negative: Brian A. Crane, Q.C.

It is my submission that the courts have not gone too far in imposing liability on lawyers. Indeed, they should be encouraged in their efforts to make lawyers properly accountable to the consumers of legal services.

The professions have lost their mystique. This was well put in an article by Jacques Barzun, ("The Professions Under Siege", Law Society Gazette, 1978, p.344):

> "The doctors, formerly worshiped as omniscient Good Samaritans, are now seen as profiteers, often of doubtful competence. Lawyers have never been popular, but they did seem the defenders of private and civil rights in time of need. Now they are thought neglectful and extortionate, when not actually dishonest."

Lawyers especially are a favourite subject of attack. Allan Fotheringham (MacLeans, July 16, 1971) once said:

> "Hatred of lawyers is a theme, a bond, an intellectual umbilical cord that pulls us altogether. Like dislike of spinach and the inability to understand algebra, it is a very human trait that draws strangers together and unites enemies."

Humour aside, it is especially important, members of the jury, for the courts to maintain the highest standards of professional excellence, of moral and professional ability. There are several reasons for this.

First of all, the administration of justice requires that lawyers be, and be perceived to be, of high calibre and moral integrity. We must not forget that the judges themselves are drawn from the ranks of the bar. If lawyers are not perceived to be persons of high quality and integrity, some of this may spill over and influence the public's perception of the bench.

Secondly, lawyers enjoy a position of great trust and responsibility in society. Clients give their personal confidence to lawyers and often entrust them with the management of their affairs or even the investment of their funds.

Others have suggested that the law societies should be responsible for professional standards. Law societies are great at disbarring criminals, but they do little to discipline incompetence. Generally across Canada, law societies do not have the ability to effectively supervise professional

standards. There are no examinations, no specialist certification, no licencing of the profession to ensure continuing legal competence.

And the facts are that there is real concern about the quality of legal services. There are more complaints lodged with law societies and more law suits than there were ten years ago. Competition among the profession is greater than ever before. There are many more lawyers per capita. For example, in Ontario in 1960, there was one lawyer for every 1,100 people; in 1981, there was one lawyer for every 575 people.

Increased competition and the problems of a small office often result in lowering the quality of legal services. As noted by Professors Reiter and Trebilcock (Lawyers and the Consumer Interest, Butterworths, 1982):

> "The busy solo or small firm practitioner takes on more work than can be handled by that practitioner and without proper systems or supervision to ensure that work can be delegated or is performed properly by subordinates. The consequences are a significant number of client complaints alleging undue delay, failure to communicate, poor quality of representation, negligence or excessive fees." (pp.59-60)
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> "It appears that the lawyers whose negligence leads to successful insurance claims are busy lawyers, cutting corners to increase their volume, delegating too much of their work or delegating it to inadequately prepared or supervised individuals." (p.87)

In 1984, Professors Littman and Robertson (1984, Canadian Bar Review) analyzed 32 reported cases over the period 1975-1983 involving testamentary capacity. The authors found:

> "The analysis indicates that in a large percentage of cases, solicitors did not discharge their duty properly and that in most of these cases, the wills failed."

And it is the average citizen that is most at risk. Claims against lawyers are usually about average transactions. The vast majority of claims concern real estate; further down the list, but increasing in frequency, are claims involving wills, estates and family law.

Therefore, members of the jury, the courts have a really important role to play in regulating professional competence and in imposing liability for negligence on lawyers in appropriate cases.

Keith Hamilton has stated that there has been a dramatic change or a quantum leap in the imposing of liability by courts. However, let me assure you that the system is not out of control. The test used by the courts for imposing liability on lawyers - that of the ordinary prudent solicitor - is the same test that has been used for years in professional cases.

The standard of care is objective, and it is a question in each case whether on the evidence a reasonably competent lawyer would have acted in the way that the defendent acted in the particular case. There is nothing new or startling about this. It is the common sense rule in all cases of professional negligence. And if the court finds that there is a foreseeable significant risk, then the solicitor must take reasonable steps to avoid the risk or advise the client of the situation.

If all the lawyers in a community follow practices that are known to be careless or risky, from a common sense point of view, are the courts to close their eyes and say "that's okay, everybody does it!". No, the courts must adopt fair and reasonable standards, viewed objectively. This is what happened in the Edward Wong case. The Privy Council said, commenting on Miss Leung's practice of relying on undertakings, which was the commonly accepted Hong Kong real estate practice:

> "It was not her skill that was put to test. It was her common sense, her prudence of any ordinary person that is put to test. The so called Hong Kong practice has an inherent risk in the ordinary sense. The fact that practically all her fellow solicitors adopted this practice is not conclusive evidence that it is prudent ... acting in accordance with the general practice she took a foreseeable risk for her client while there was no necessity to do so. The fact that other solicitors did the same did not make the risk less apparent or unreal."
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> Edward Wong Ltd. v Johnson, Stokes (P.C.) [1984] 1 A.C. 296 at p. 306
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> Cited in Glivar v. Noble 8 O.A.C. 60 at p.67

This approach is nothing new. As early as 1933, the House of Lords said in a banking case:

> "It is argued that ... a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking."
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> Lloyds Bank v. E.B. Savory & Co. (1933) A.C. 201

This is consistent with many of the recent cases.

As for a lawyer being liable to third parties, this rule was established in 1964 in the Hedley Byrne case which imposed liability on accountants for financial statements which were relied on by third parties. What is surprising is that the courts have taken so long in imposing similar liability on lawyers.

Thus, the courts are shaking off some of the mystique of the profession and are imposing on lawyers the same standard of care as on other professionals. And why not? Should not the consumers of legal services expect a high standard of competence and is this not in the public interest and in the interest of the profession? And if damages are to be paid, then this is a risk that can be covered by insurance by the professional who earns his income by the giving of advice.

I therefore say that the courts have not gone too far in imposing liability on lawyers.

Thank you.